
Date: September 1, 1994

Case No: 93-ERA-24

CALVIN J. CREEKMORE
COMPLAINANT

against

ABB POWER SYSTEMS ENERGY SERVICES, INC.
RESPONDENT

Appearances:
Robert W. Heagney, Esq.
For the Complainant

James M. Paulson, Esq.
Benjamin Smith, Esq.
John Susen, Esq.
For the Respondent

Before: **DAVID W. DI NARDI**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. § 5851 ("Act" or "ERA"), and the implementing regulations found in 29 C.F.R. Part 24, whereby employees of licensees or applicants for a license of the Nuclear Regulatory Commission and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The undersigned conducted hearings in New London, Connecticut on May 4,5,6,7,12, 1993, July 26,27, 1993, and November 22, 1993, in Boston, Massachusetts at which time the parties were given the opportunity to present oral arguments, their witnesses and documentary evidence.[1]

Procedural History

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Complainant, in a letter dated and notarized on February 11, 1993 and sent to the Office of the Administrator of the Wage and Hour Division, Employment Standards Administration of the Department of Labor ("Wage and Hour Division"), alleged that his employer had laid him off on September 10, 1992 based on a discriminatory discharge because he had engaged in protected activity.[2] (ALJ EX 4) In his complaint letter, dated February 9, 1993 (ALJ EX 4), Complainant alleged that he had been terminated because he brought to the attention of Respondent's management certain violations of security screening procedures and because he would not participate in a plan or conspiracy to coverup or downplay these violations.

The Wage and Hour Division conducted an investigation of Complainant's allegations and determined that the allegations were substantiated, that Complainant's termination on September 10, 1992 was based solely on protected activity and that the discharge was a retaliatory action based on certain safety complaints. Assistant District Director, Kenneth W. Jackson, advised the parties of the results of his investigation by letter dated March 23, 1993.
(ALJ EX 3)

On March 26, 1993, Respondent filed a timely appeal of Wage and Hour Division's conclusion, (RX 1, RX 2) This claim was assigned to this administrative law judge and, on March 31, 1993, the undersigned issued a notice of hearing and pre-hearing order which scheduled the hearing to begin on May 4, 1993 and directed the parties to submit pre-hearing reports and witness lists. (ALJ EX 1) Complainant and Respondent filed pre-hearing reports on April 20, 1993 and April 19, 1993, respectively. (CX 2 and RX 5) On eight days the undersigned conducted a *de novo* hearing on the complaint and the parties were given the opportunity to submit post-hearing briefs, as well as reply briefs. (ALJ EX 1, ALJ EX 17)

Post-hearing evidence has been admitted as follows:

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EXHIBIT NO	ITEM	FILING DATE
RX 48A	Attorney Smith's letter filing the	12/07/93
RX 49	December 1, 1993 report of	12/07/93

CX 77	Attorney Heagney's letter relating to the rescheduling of the deposition of Dr. Gore	02/22/94
RX 50	Attorney Smith's letter relating to the rescheduling of Dr. Gore	02/22/94
ALJ EX 16	This Court's **Order** establishing a briefing schedule	03/14/94
RX 51	April 8, 1994 letter from Dolores A. Falzarano, RPR-CM, filing the Original of the	04/10/94
RX 52	March 10, 1994 Deposition Testimony of Dr. Gore	04/10/94
CX 77A	Attorney Heagney's letter requesting a short extension of time for the filing of briefs (the request was granted)	04/26/94
RX 53	Respondent's brief	06/21/94
CX 78	Complainant's brief	06/22/94
CX 79`	Complainant's Prayer For Relief	06/22/94
CX 80	Attorney Heagney's Fee Petition	06/22/94
CX 81	Complainant's brief in proper format	06/23/94
CX 82	Attorney Heagney's letter requesting the opportunity to file a reply brief	06/27/94
ALJ EX 17	The request was granted to both parties	06/27/94

RX 54	Respondent's reply brief	07/18/94
CX 83	Complainant's reply brief	07/19/94

The record was closed on July 19, 1994, as no further documents were filed.

SUMMARY OF THE DECISION

Calvin J. Creekmore ("Complainant" herein) is a 27 year employee of Combustion Engineering, a corporation now owned by an entity called ABB Power Systems Energy Services, Inc. ("ABB" or "Respondent"). Complainant, during this period, had been employed by essentially the same employer in a field of work dealing with the nuclear power industry, or power systems. He was employed from June 10, 1965 until September 10, 1992 by a corporation that is a section of ABB Combustion Engineering known as PSESI, and in that role his responsibilities were in quality control and quality assurance.

Complainant's primary responsibilities were to develop sales in the quality control field, which is the selling of temporary personnel to staff nuclear power plants during shut-down periods. The shut-down periods are required by federal law for safety and maintenance purposes.

This claim revolves around Complainant's involvement in an audit of the Security Department of PSESI, and the disclosure, pursuant to such audit, of conduct in that department which was inconsistent with federal regulations mandated for security audit personnel relating to the granting of unauthorized access of such personnel to nuclear power plants.

Complainant emphatically insisted upon the correction of this situation, and brought about a long series of events which corrected the situation, but which were financially a burden on the corporation and affected the corporation's reputation in the community.

PSESI, the employer here, a sub-contractor under federal regulations, is a covered party under the ERA. Complainant took

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actions to see that a notice of the security violations was made to the U.S. Nuclear Regulatory Commission (NRC) in accordance with federal regulations.

Moreover, notices were also made to the affected licensed nuclear power plants and utilities that were being serviced by temporary employees "badged" by the Security Department of PSESI.

After the follow-up audit was completed, Complainant was called to the office of the President of the corporation, was told that the corporation was going out of the quality control business, that his services would no longer be needed and that he was being laid-off. Prior to his termination, Complainant had been offered and accepted at least one position with Combustion Engineering; however, such offer was summarily withdrawn during the audit period and following his termination because of Complainant's protected activity.

Following his termination, Complainant applied for two positions with the corporation and did not receive either position although the record leads me to the conclusion that he

was well qualified for both of those positions. Complainant pursued every employment opportunity available to him and he accepted the first permanent employment that he was offered. However, this job caused him to relocate his entire family from the State of Connecticut, where they had lived for a number of years, to the Commonwealth of Virginia.

Complainant has been required to take a position at less remuneration than he had at PSESI; his new position has no retirement plan, has a lesser medical plan, and his terminated employment has also subjected him to lost fringe benefits, including vacation and other employee benefits, all of which benefits have resulted in a substantial financial burden for the remainder of Complainant's working career. This financial burden is a direct result of Complainant's illegal and discriminatory discharge.

Specifically, Complainant is seeking relief in terms of the lost financial position that he and his family have suffered, as well as compensatory damages for the emotional distress he has suffered at the hands of Respondent as a result of the Respondent's disparate treatment of Complainant on and after April 16, 1992. Complainant has suffered a heart attack which his physician believes is related to this termination and the stress resulting therefrom. Complainant also seeks an award for the damage to his personal reputation in the nuclear industry, as

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it is essential to have a credible professional reputation to be accepted in this industry as a reliable and trustworthy employee.

These actions, taken in their totality, were the sole and proximate cause of Complainant's discriminatory discharge and the Respondent's proffered reasons for his layoff are, in my judgment, pre-textual.

SUMMARY OF THE EVIDENCE

A. Background

1. ABB Power Systems Energy Services, Inc. ("PSESI" or "ABB"or "Respondent"), formed in 1975 and incorporated in 1984, is a wholly-owned subsidiary of Combustion Engineering, Inc. (C.E.). Asea Brown Boveri Inc. (ABB) acquired C.E. in December of 1989. PSESI is a firm that hires and provides individuals for temporary field assignments with its utility clients, including producers of nuclear power. The three technical business lines, or departments, that comprised PSESI prior to September of 1992 were: (1) Health Physics/Decontamination; (2) Engineering and Training Services; and (3) Quality Services. (TR 765)

2. At all times relevant to this proceeding, Complainant was employed as the Manager of Quality Services at PSESI, having overall responsibility for Quality Assurance and

Quality Control ("QA/QC"). (TR 74-77) The QA/QC business line was responsible for providing nuclear clients with professionals to support the client's staff in such functions as auditing, inspections, surveillance and training. Complainant's primary responsibilities included selling the QA/QC services to clients and overseeing PSESI's internal Quality Assurance program. (TR 76, 295-296, 417)

3. In 1987, Complainant assumed responsibility for Quality Control Services and certification of QA/QC technicians and others to gain unescorted access to nuclear facilities regulated by the NRC. (TR 76, 296-97) Both federal law and company policy require that these clearances be granted only after the completion of an extensive background investigation on the individual for whom access is sought. (TR 92-93; **see, e.g.**, 10 C.F.R. § 73, 73.56-57) These security clearance procedures at PSESI are commonly referred to as the "Access Screening Program."

4. Lionel Banda became the President of PSESI on

April 1, 1992.

B. Security Violations and Termination

Complainant was employed by C.E. on June 14, 1965. In 1981, Complainant was promoted to the position of Senior Level III Engineer in the C.E. Nuclear Plant Support Service Group of Construction Services which provided Quality Assurance. (TR 64, 65) C.E. was a major producer of Nuclear and Fossil Fuel Power Generating equipment. Nuclear Power generation work is governed by Federal Regulations, 10 CFR 50, Appendix B, which requires an 18 point criteria be completed to comply with the Regulatory Scheme. (TR 66,68)

In 1983, Complainant was promoted to the Nuclear Plant Support Services, a group which provided staff augmentation of Health Physics Technicians to the Nuclear Industry. Complainant's new position required that he certify individuals as Quality Control Technicians and develop for the Nuclear Plant Support Service Group written certification procedures for the certification of Quality Control Technicians to comply with federal security regulations. Complainant's responsibilities in his new position included the sales of the quality control business line or other services and the certification of Quality Control Technicians. In 1985 he was promoted to the position of Supervisor of Quality Services, a position in which he remained until September 10, 1992. (TR 69, 72, 73)

In 1987, C.E. established a subsidiary corporation known as Power Systems Energy Services, Inc. (PSESI) to which Complainant was assigned with the same responsibilities. A portion of PSESI involved a Security Business or Background Investigation Business including the sale of Nuclear Security background services to utilities. With the creation of PSESI as a separate corporate

entity, it became necessary for PSESI to publish a Quality Assurance (Q.A.) Manual and supporting documentation, separate and independent from the C.E. Q.A. Manual, as was required by 10 CFR 50. During the course of his employment with C.E. and PSESI, Complainant received several performance reviews. During his absences from the offices, the President of PSESI, Jeffrey Wyvill, placed Complainant in charge of the president's duties. Throughout his career with PSESI, Complainant was a reliable and trustworthy employee who did an excellent job in fulfilling his responsibilities. (TR 75-78, 80-81; CX 33, CX 34, CX 37)

Due to market competition and the lack of a marketing person, PSESI's market share eroded in 1981 but Mr. Wyvill and PSESI were committed to continuing the Quality Assurance /

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Quality Control (QA/QC) business line. (TR 86)

In February of 1992 the Share Nuclear Access Authorization Audit Group (SNAAAG) indicated that it would audit the PSESI Security Group during the week of May 4-8, 1992 (TR 87) or on July 6, 1992. (CX 16)

An audit had been conducted of the Security Group Engineering Nuclear Power Business Nuclear Quality Assurance Group in late January or early February of 1992. This audit fulfilled the requirement of the PSESI Nuclear Quality Assurance Manual Section 2.12 for an independent annual audit. (TR 88)

Following his appointment as President of PSESI, Mr. Lionel Banda instructed Calvin Creekmore to see that an internal audit of the PSESI security group was performed prior to the SNAAAG audit. As Claimant was a Manager of a business line with sales responsibilities, it was considered a potential conflict of interest for him or his unit to perform mandated audits of the security group. Licensees, contractors and subcontractors must perform background investigations of all persons who are requesting unescorted access to work in a nuclear power facility, a requirement mandated by the NRC in 10 CFR 73, Reg. Guide 5.66, accepting nuclear document 89-01. The PSESI Security Department business was to fulfill the 10 CFR 73 background investigations for PSESI technicians before they gained access to the nuclear facility. (TR 78, 88, 90-93; CX 19, CX 20)

On April 8, 1992, Complainant informed Roy Newholm, Manager of the PSESI Security Group, that a random audit of Security files would take place before the SNAAAG audit which was scheduled for May 4-8, 1992. Complainant assigned Dennis Silver, who worked in QA/QC for PSESI, as Lead Auditor and Jack Mayoras as Auditor. However, Mr. Mayoras requested that he be allowed to begin his audit work early to comply with his schedule, and Complainant approved. On April 16, 1992, Complainant returned to PSESI after two days away from his office and spoke to Jack Mayoras. Mr. Mayoras reported that he proceeded to initiate the audit work and while in the Security Group overheard two Security Investigators discussing what date to place on certain documentation. NRC Regulations 10 CFR 73 and Numarc 89-01

require that all security criteria be established prior to the request for unescorted access or the so-called "Good Guy Letters" being issued by the PSESI Security group to the nuclear utility. The security department was required by 10 CFR 73 and Numarc 89-10 to complete all security background investigation steps prior to granting unescorted access for a technician. (TR 91, 96, 97,

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99-103; CX 2, CX 18, CX 19)

As of April 16, 1992, Mr. Mayoras did not report to Complainant any other audit activity or any action he had taken to follow-up on the conversation he had overheard and any concern it had raised in his mind. Complainant immediately requested that Mr. Newholm come to his office to discuss the information overheard by Mr. Mayoras. Mr. Newholm met with Complainant on April 16, 1992 in Complainant's office, during which meeting Mr. Newholm acknowledged that the PSESI Security Group had issued requests for "Good Guy Letters" without completing all the necessary background investigations required by 10 CFR 73, that, thereafter, the background checks would be completed and the investigators' files would be backdated to appear to have been completed prior to the issuance of the request for unescorted access letters to the Nuclear Power Utility, the "Good Guy Letters". Following this meeting with Mr. Newholm, Complainant immediately conducted interviews of the Security Group investigators with Mr. Mayoras in attendance. Complainant made notes of the interviews of three security investigators' interviews. The two long-term investigators in the security department told Complainant and Mr. Mayoras of the practice of backdating and issuing "Good Guy Letters" without having completed background investigations and that they had been instructed to do so by the Manager of the Security Department. (TR 101, 103-107; CX 26)

Terry Goodwin and Andrea Bruce, the two senior investigators with the security group, admitted that they had been instructed to issue requests for unescorted access without the required background checks and to backdate the files when these checks were completed. Complainant attempted to discuss the failure of the security group to meet the requirements of 10 CFR 73 on April 16th and 17th, but could not speak to Mr. Banda until Monday, April 20, 1992. On Friday, April 17, 1992, Complainant documented his concerns following the interviews of the security group personnel, including Mr. Newholm, intending to present this memorandum to Mr. Banda at the first opportunity.

On Monday, April 20, 1992, Complainant and Roy Newholm conducted a training session to discuss with the investigators of the PSESI Quality Assurance Program, the PSESI commitment to published security screening procedures and the potential penalties for falsifying security records. On that same day, at approximately 2:00 p.m., Complainant spoke to Lionel Banda by telephone and informed him of the very serious nature of the security problem. (TR 107-110, 115, 117; CX 27) During the

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telephone conversation between Mr. Banda and Complainant on April 20th, Mr. Banda informed Mr. Creekmore that he, Banda, was aware of some minor inconsistencies in the security program as a result of a meeting the prior week on April 13, 1992 with Mr. Newholm, Mr. Mayoras and Gerry Chevalier, the security group Supervisor reporting to Mr. Newholm. Mr. Banda indicated to Complainant that he had made a management decision to allow the security group to correct the problem. While Complainant had multiple meetings with Mr. Newholm, Mr. Mayoras and Ms. Chevalier between April 16, 1992 and his telephone conversation with Mr. Banda on the afternoon of April 20, 1992, none reported to Complainant that a prior meeting on the subject of the security audit had ever taken place.

On April 21, 1992, Complainant talked with Mr. Banda in the latter's office to discuss the security investigators' statements set forth in his notes and the April 17, 1992 memorandum from Complainant to Mr. Banda, both of which documents Complainant gave to Mr. Banda during this meeting. (TR 115-117)

Complainant's April 17, 1992 memorandum to Mr. Banda identified the events leading up to Mr. Mayoras's discovery of the flagrant violations by the PSESI Security Department on the Carolina Light and Power (CL&P) Access Screening Program, violations involving twenty-five (25) individuals were known to have been granted unescorted access to the CL&P Nuclear Utility without completion of the background checks. Thereafter, the security group would generate reports with incorrect dates as much as four months earlier than actually completed. Complainant made a list of recommendations in his memorandum including that PSESI must immediately advise CL&P of the security procedure failures and to complete all investigation files with appropriate dates. An NRC information bulletin had been published prior to April 16, 1992, which referred to issues which arise when contractors provide a nuclear utility with information that caused the utility to violate its license, with such violations involving the assessment of fines and penalties by the NRC against the contractor.

The violation of the security access screening program, i.e., the falsification of the unescorted access security files by the Security Group managed by Roy Newholm, was a failure to comply with Federal Regulations 10 CFR 73. (TR 109, 111, 113-115; CX 25, CX 27) Complainant recommended to Mr. Banda that outside auditors should be brought in to evaluate those procedures which Complainant had determined constituted a serious problem. Mr. Banda instructed Complainant to arrange for outside

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auditors to initiate an audit of the security files and Complainant arranged for Ron Fitzgerald, of Nuclear Power Business Quality Assurance, to supply two auditors, Bob Driscoll and Bruce Allbee, to begin an immediate audit of security files. This audit confirmed the conclusions reached by Complainant, namely that security regulations had been violated and that a serious problem existed. (TR 120-121; CX 26,

CX 27)

During the meeting between Complainant and Mr. Banda on April 21, 1992, Mr. Banda returned the two documents handed to him by Complainant and instructed Complainant "to get rid of the documentation" and "not to keep it," as it was "lying around as ammunition". (TR 118-119, 121)

On Wednesday, April 22nd, Mr. Banda asked Complainant to accompany him to a meeting in Mr. Skibitsky's conference room to review alleged violations of the PSESI Security Access Program. Mr. Skibitsky is President of ABB Nuclear Services, the parent firm of PSESI. At this meeting, Complainant reported his findings that security authorizations had been sent prior to the completion of required background checks for each individual, that these findings were confirmed by the audit of Mr. Fitzgerald, who found direct evidence of violations of the PSESI security procedures, in that security letters were signed by the supervisor without completion of the required security checks and that security group investigators admitted that they had been instructed to skip certain procedures in verifying references. It was agreed at that meeting that Mr. Banda would notify the affected utilities of the security problem. (TR 123-125; CX 21)

Mr. Banda convened a meeting of his staff following the Skibitsky meeting wherein he instructed the PSESI staff to refer to the security issue when speaking to anyone only as omissions and inconsistencies as opposed to serious violations involving falsifying records, although the senior management who met in Mr. Skibitsky's office with Complainant were aware that falsification of records and backdating had routinely taken place in the PSESI security group, serious violations of security regulations because if the N.R.C. or the utilities to which PSESI supplied technicians became aware that unescorted access authorization were being provided to the technicians through falsified documentation, the technicians would have been immediately pulled from the nuclear power plant. However, there were other ramifications. Should the Security Department of PSESI have been decertified by the N.R.C. or the utilities for the non-compliance or the falsification of 10 CFR 73 background checks, all unescorted access authorizations granted to all PSESI technicians

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and Combustion Engineering permanent and temporary technicians would have been terminated, a serious repercussion for all concerned. (TR 123-124, 126-127; CX 21)

A "Plan of Action" was put in place at the April 22, 1992 meeting held by Mr. Banda which included (1) the removal of the Manager and the Supervisor of the PSESI Security Group, Roy Newholm, and Gerry Chevalier, respectively, (2) the notification of the utilities of an inconsistency or oversight in some of the background packages, (3) verification and validation of existing security background files and (4) performing a Root Cause analysis to ascertain why the security breakdown had occurred. The complete extent of the security problems became apparent on

June 2, 1992, at which time a validation and verification final summary report was issued which disclosed that over 56.2% of the security files were found to be deficient, including 28.7% of the files having incomplete criminal background checks and deficiencies in employment history, personal references, educational background, credit reports, photo I.D. and driving records. (TR 128, 130, 139, 142; CX 21, CX 25)

The essential problem in the security department was that the process had not followed the security department's published procedures. (TR 242; RX 14)

Complainant was assigned to head up the Verification team and to act as interface for PSESI with the utilities, the N.R.C. and the SNAAAG audit Team to discuss and resolve the issues concerning the failure of the Security Program. Moreover, Complainant was directed by Mr. Banda to rewrite the Access Screening Procedures for the Security Group's direction in conducting security background checks for unescorted access authorization, an assignment which he completed in July, 1992. During the course of the reverification process, the N.R.C. brought in an investigator, Nancy Irving, who attempted to determine the Root Cause of the security problem and its severity. However, Lionel Banda instructed Complainant and others not to discuss falsification of records with the N.R.C. or others and, thereafter, instructed Complainant and others to no longer have any communication with Ms. Irving of the N.R.C. because she was getting particularly close to the real Root Cause of the security problem.

Complainant, from the April discovery of the security problem to his dismissal in September of 1992, was assigned to work on the security group problems and was unable to complete the Q.C. business obligations which were his normal assignment.

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Complainant was also told that he could not take a vacation until he had completed the assignment from Mr. Banda in resolution of the security issue. During the period Complainant worked on the security issue, from April 16, 1992 throughout that summer, he was required to work long hours devoted to this resolution, organizing resolution teams, talking to utilities, clients and the N.R.C. or other parties with questions regarding the security process (TR 142-144, 146-147, 150, 152)

C. T.V.A. JOB OFFER

In the fall of 1991, Complainant was approached by George Griffiths, the Regional Manager of Nuclear Power Business for Client Services of Combustion Engineering (now known as Asea Brown Boveri (A.B.B.)), to determine if he would be interested in a position as a Client Manager for A.B.B. at the Tennessee Valley Authority (T.V.A.). Complainant indicated he was certainly interested as it would provide him an opportunity to stay with A.B.B. and to return to his home state of Tennessee. Mr. Griffiths indicated he would follow-up with the opportunity.

Further discussions between Mr. Griffiths and Complainant took place in the early spring of 1992, including discussions of relocating to the area in Tennessee, about his salary in that position, including a four (4%) percent increase in salary. Complainant accepted the offer of a four (4%) percent increase and Mr. Griffiths expressed happiness about the acceptance and he welcomed Complainant back to Tennessee. Complainant believed an agreement had been reached and he then discussed the Respondent's relocation policy with Ms. Wargo to determine which costs the Respondent would absorb. The job offer was extended to the Complainant as Mr. Griffiths was aware of Complainant's good relationship with many T.V.A. officials.
(TR 152-154)

Shortly after Mr. Banda became president of PSESI, Complainant made Mr. Banda aware of the offer of the T.V.A. position and his intention to accept that position, a conversation which took place prior to the security issue arising, and Mr. Banda advised he had no problem with Complainant accepting the position. Complainant was ready to leave Connecticut and go to the T.V.A. Client Manager position until Mr. Banda advised him that he could not go anywhere until the security issue was cleared up; thus, Complainant stayed to work on resolving the security issue. (TR 567) In June or July, 1992, Complainant again brought up the T.V.A. job with Mr. Banda and

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indicated his wishes to be allowed to move and requested that someone else might be put in his position. Complainant was also offered a Client Manager position for A.B.B. by John Connolly who had two openings for Client Manager positions but Complainant turned down these jobs as he had already accepted the T.V.A. Client Manager position from George Griffiths.

From around July or early August, after it had become apparent that Complainant could not be silenced, he began to see a significant change in attitude from senior management (Complainant describing it as a cold attitude) toward him, during which time, George Griffiths became more difficult to contact. Despite being required to work on the security problem through the summer months, Complainant remained responsible during this period for the Q.C. business line. (TR 157, 159-162)

In October of 1992, in early evening, George Griffiths, from his hotel telephoned Complainant at his home and informed Complainant that he, Griffiths, was shocked by Complainant's lay-off, that he had tried to talk to Mr. Banda and Mr. Spinell about the situation but neither wanted to talk about the Complainant's layoff and Mr. Spinell had told him to back off and stay away from the issue concerning Complainant. Mr. Griffiths stated that all of this was "very political" and that Complainant was being made the "fall guy for the security problem." Apparently, an attempt was initially made to inculpate another person as the "fall guy" because Complainant had discussed his termination and the security problem at PSESI and Mr. Wyvill indicated that an attempt had been made to put some documentation tying him

(Wyvill) to the security problem in his (Wyvill's) personnel file and that Wyvill had stopped this attempt through legal counsel. (TR 204, 205, 207)

D. PRE-TEXTUAL REASONS FOR TERMINATION

During the first six months of 1992, the Quality Control business unit performed ahead of scheduled projection for the year, was operating below budget and its return on sales of 8.6% was more return than either of the other two PSESI Operation Groups. The Q.C. Group had shown a six month profit through June of 1992 of $230,000.00 but the profit for the entire PSESI was only $143,000.00. The financial performance for PSESI in the first six months of 1992 was poor, in part due to the breakdown of the Security Program, and the costs of the reconstitution of the Security Program at somewhere between $300,000.00 and $500,000.00. Moreover, the cost of the Q.C. group for the first

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six months of 1992 were $3,700.00 under its total budgeted costs of $139,944.00. Mr. Creekmore's Q.C. unit had submitted a proposal to Florida Light and Power in the spring of 1992 and, although the proposal was the lowest bid, it was disqualified because of a bidding error which had occurred because of Complainant's absence from the Q.C. unit addressing the security problem. This error cost PSESI over $3,000,000.00 in business, a financial loss which arose partly because of the security problems. On September 10, 1992, Mr. Banda asked Complainant to meet with him at 9:30 a.m. in his office. Mr. Banda informed Complainant that PSESI had decided to go out of the QA/QC business and to lay off Complainant . Complainant was emotionally shocked by the decision to lay him off and he was so devastated that he immediately discontinued the meeting and left the room. (TR 164-165, 167, 169-171)

Complainant then returned to his office and, although he had given the Respondent twenty-seven (27) years of loyal employment, Complainant was immediately walked to the office door by a career transition company employee and he left the building. Thereafter, he met with Ms. Suzanne M. Wargo for an exit meeting wherein she provided him with a separation notice which indicated the reason for the separation as a reduction in work force. Complainant questioned this and Ms. Wargo also informed him that PSESI was still going out of the QA/QC business line. As Complainant was the sole support of his family, he sought to obtain a lump sum distribution of his cash balance pension plan to liquidate all his debts in a panic kind of situation, fearing loss of all that he had accumulated during his working career. Complainant's medical coverage was terminated on Christmas day, 1992. (TR 171-172, 180-181, 184, 186-187; CX 10)

On Sunday, October 11, 1992, through an ad in the **Hartford Courant**, PSESI sought a Nuclear Security Manager to fill the position vacated when Roy Newholm was removed due to the security problems. Complainant immediately applied for this position by hand - carrying an application and letter to Ms.

Wargo. Although Complainant possessed the knowledge and experience called for in the ad, PSESI hired another individual who had never worked for Respondent or ABB. (TR 190-191, 193, 197; CX 40)

Roy Newholm, who was Manager of the Security Group in April, 1992, was suspended without functional responsibilities other than answering questions brought on by the auditors attempting to resolve the security problems. While Mr. Banda had advised Complainant that Respondent was going out of the QA/QC business, Complainant learned after leaving PSESI that PSESI was actually

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continuing to pursue work in the quality control area, particularly at the New York Power Authority and Omaha Public Power District. Moreover, Roy Newholm was named Total Quality Officer at PSESI and solicited Q.C. business on behalf of PSESI indicating he was part of a new quality organization. He introduced himself to utilities as the contact for PSESI for Sales of Quality Control Services, the role formerly held by Complainant. Furthermore, Roy Newholm solicited Q/C work on behalf of PSESI from three (3) separate utilities in late 1992 and early 1993, although Respondent was ostensibly going out of that business. After Complainant was laid off from PSESI, a Q/C bid was placed with the New York Power Authority which PSESI had no obligation to bid. Roy Newholm also solicited Q/C work from Omaha Public Power District for PSESI after Claimant was laid off from PSESI despite the fact that PSESI had no duty to bid this work. PSESI through Roy Newholm, submitted an unsolicited proposal to do Q/C work at Iowa Electric following Complainant's layoff. Moreover, A.B.B. has continued to solicit new contract work including an integrated package of Q/C services to be supplied by PSESI. (TR 208, 210-16, 218; CX 57-CX 59)

As already noted above, Mr. Banda had made Complainant responsible to ensure that procedures, both present and future, met A.B.B. standards and contractual commitments to nuclear utilities and to respond to the SNAAAG Audit and other utilities. However, Mr. Banda did not support that commitment with the actions he subsequently took. For example, by memo dated May 13, 1992, Mr. Banda indicated that PSESI would have to limit its financial investment in its security program, a statement which was in direct opposition to and contradicted his commitment to spend money to reconstitute the security program. Complainant, following receipt of this memo, met with Rick Schroeder, Vice President of Total Quality of A.B.B., as Mr. Schroeder was visiting PSESI to discuss the progress of the security department's reconstitution. In Complainant's response to Mr. Schroeder's inquiry, he explained his concern that on the heels of identifying the problem and making commitments to utilities to reconstitute the security program, PSESI was starting to cut costs, specifically in its commitment in its security program. The meeting between Mr. Schroeder and Complainant took place within two to three weeks of the May 13th Lionel Banda memo. (TR 243-247; CX 46)

A few days following the meeting between Complainant and Mr.

Schroeder, Complainant was called to a meeting in Mr. Banda's office with Mr. Skibitsky and both were obviously irritated that Complainant had informed Mr. Schroeder of the Banda memo stating

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a cut in the commitments to the security program. Complainant, in his role as Quality Assurance Manager and once he had learned of the security problem, took proper steps to identify the scope of the problem, report it to management, see that corrective actions were implemented and ensure that the program complied with Federal Law. Complainant properly reported the security problem to Mr. Banda and notices were subsequently given to the N.R.C. and to the affected utilities because of Mr. Creekmore's actions and documents. These actions were taken solely at the insistence of the Complainant as others at management and staff sought to downplay or coverup the situation as mere omissions and inconsistencies (TR 248-251) or as mere paperwork gaps. (TR 532, 590)

Complainant forced the issue of the security problem to be addressed as a serious problem at the highest levels at Respondent, including notification of the N.R.C. and the affected nuclear utilities, actions which resulted in his termination. However, Complainant's termination was covered by a facade of going out of the QA/QC business to cover the retaliation toward Complainant for his responsibility in forcing the security issue to be addressed in a correct and expeditious manner. (TR 171, 250,251)

E. MITIGATION OF DAMAGES/DAMAGES

On September 11, 1992, Mr. Creekmore began an intensive search to find new employment, including attending fifteen Career Transition instructions, sending out over two hundred resumes, making dozens of phone calls within the quality circle in the industry and networking with industry people. In an attempt to mitigate damages, on December 22nd or 23rd, Complainant began work as a temporary consultant to do material inspection for the New York Power Authority doing program and procedure reviews in Oswego, New York. Complainant continued to seek full time employment while working for New York Power Authority including applying for another position with A.B.B. and also with the Atlantic Group as Quality Assurance Manager. Complainant was offered the Quality Assurance position with the Atlantic Group before he could interview for the A.B.B. position. Complainant was compelled to make an immediate decision and he accepted the Atlantic Group position as Mr. Creekmore needed security for his family and had no assurance that he would receive the A.B.B. position. Complainant had to relocate his family to Norfolk, Virginia to accept the Atlantic Group position. (TR 196, 198, 200, 202-203)

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At his termination, Complainant was fifty years of age and

he hopes to continue working until he reaches sixty-five. Complainant lost wages as a result of his termination from PSESI because, as of May 27, 1993, his annual loss of salary amounted to $5,400.00 as a result of the lower wages. Complainant had been promised the T.V.A. Client Manager position and a 4 percent increase which, over fifteen more years of service, would be $39,600.00 more than Complainant would have earned under his PSESI salary. The salary lost between Mr. Creekmore's PSESI position and the Atlantic Group salary amounts to $75,000.00 over the same fifteen year period. He lost $68,500.00 on the forced sale of his house to move to Virginia to accept the Atlantic Group position, had to pay realty fees, closing costs and points to sell his house of $9,800.00 and $325.00 attorney's fees and he was required to pay $7,500.00 in bank payments for his Virginia Mortgage. He has also paid ,050.00 to cover medical expenses after the PSESI medical benefits were terminated on Christmas in 1992. He had $2,000.00 in expenses for mailing, telephone and travel related to finding new employment and has incurred travel expenses of $2,240.00 to return to his family in Connecticut and to bring his family to Virginia. Moreover, he paid $8,800.00 in excess taxes to pay his debts following his termination, based upon the premature lump sum distributions he received. The PSESI Pension Plan was paid by PSESI and Complainant was an eligible participant, who, if he had remained employed at PSESI for fifteen additional years with 4 percent annual increases, would have accumulated $186,345.00 in additional interest. Moreover, over the 27 years of service with Combustion Engineering - A.B.B., Complainant averaged a 4 percent salary increase per year and his salary with PSESI in September 1992 was $66,400.00. Complainant also lost ,173.00 in wages per week during the time he had to leave Virginia to attend his trial in New London and Boston. (TR 250, 257, 259-65, 272, 275)

Moreover, Complainant will receive less vacation in his new position with the Atlantic Group as he receives two weeks only after fifteen years of service. Complainant had received four weeks vacation at PSESI and will lose $31,925.00 in paid vacation due to his loss of vacation time. (TR 273-274, 279-280)

Complainant seeks an award of compensatory damages, in the discretion of this Court, for the physical injury and emotional distress caused by his discriminatory discharge. The Connecticut Workers' Compensation Act provides a basis to consider an award for the heart attack suffered by Complainant, Complainant alleging that his heart attack resulted as the natural sequela of

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his termination and the resulting emotional stress therefrom. The Connecticut Workers' Compensation Act, Conn. Gen. Stat. § 31-275 et seq. The disabling effect of the loss of an organ can be compensated at 66.66 percent of the average weekly wage up to the maximum, an award which, pursuant to Conn. Gen. Stat. § 31-309, can last for up to 780 weeks. Conn. Gen. Stat. § 31-309. **See, e.g., Ancona v. City of Norwalk,** 217 Conn. 50, 584, A.2d 454 (1991) (Benefits for partial impairment of the worker's heart)

In the matter of **Fleming v. County of Kane, State of Illinois,** 898 F.2d 553 (7th Cir. 1990) the court surveyed the range of awards for wrongful discharge and approved $40,000.00 as within the range for the emotional distress arising from the discharge, the Court noting that the trial judge had reduced the jury's awarding of $120.000.00 to the wrongfully discharged employee.

The Complainant requests that this Court look to the spirit of the ERA, the Respondent's intentional conduct and its impact upon Complainant and this Court's experience in the fields of workers' compensation law, damages and personal injury cases in awarding compensatory damages herein.

F. COMPLAINANT'S HEART ATTACK AS THE NATURAL SEQUELA OF HIS TERMINATION

Dr. John P. Parker, M.D., F.A.C.C., is presently treating Complainant with regard to the heart attack he suffered on June 7, 1993. Dr. Parker, based upon Complainant's personal and medical history, and the physical examination, has opined that the major contributing factor to Complainant's present heart attack was the stress he was undergoing as a result of his termination from employment on September 10, 1992, and the resulting turmoil in his life. Dr. Parker's opinion is based upon his training and experience as a cardiologist and within reasonable medical probability. (TR 1188-1191, 1202-03; CX 70)

On the other hand, Respondent's medical expert, Dr. Joel M. Gore, reviewed medical records of Complainant and issued a letter of opinion regarding the relationship between Complainant's termination and his heart attack. (RX 41) The parties deposed Dr. Gore and the doctor testified that there are no studies of which he is aware that identify emotional stress in and of itself as a precipitation of a heart attack and, thus, he feels that it is not necessary to examine the patient for that particular matter. The doctor has opined that blood clots are the cause of

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heart attacks and indicated that preliminary data exists to suggest platelet functions may be affected by emotional stress or adrenalin levels or epinephrine levels but he is not personally convinced that it is mental stresses, per se, that cause platelet function.

Moreover, Dr. Gore believes for stress to have been related to the heart attack Complainant suffered, there should have been some sort of record of medical intervention for stress prior to the heart attack.

However, Dr. Gore agrees with Complainant's physician in Virginia that Complainant is "very anxious about having been terminated from his position, he's under a great deal of emotional stress and at least in part responsible for his symptoms". Dr. Gore found two indicators of risk for a heart

attack which he stated in his report; (1) Cholesterol and (2) Smoking; that a person such as Complainant, who has not smoked for over ten (10) years, had no higher risk than a non-smoker and that Complainant's cholesterol level of 233 is a risk because it is above 200 and that on May 15, 1992, Complainant's cholesterol level was 215, an increase caused by dietary indiscretion and that people will eat more when under emotional stress. (RX 41, RX 52)

On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of the witnesses, including a most credible Complainant, I make the following general comments about this proceeding:

This matter presents the usual credibility problems encountered in a so-called "whistleblower" complaint and I have extensively summarized the testimony given at the hearings held herein to put the proceeding before me in proper perspective.

At the outset, I find and conclude that the version of events, as testified by Complainant and his witnesses, is more credible, that he was terminated because he had engaged in protected activity, that he would have been retained as a valued employee, after twenty-seven (27) years of reliable, conscientious and loyal service to Respondent, but for his protected activity and that Respondent's alleged reasons for the termination were not legitimate and **bona fide** but were a subterfuge to discharge an employee who would not cooperate with a plan to coverup, downplay or minimize serious violations of the NRC statute and the implementing regulations involving Respondent's security access screening program.

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While Respondent relies upon the absence of the "smoking gun" dealing with the circumstances surrounding the termination, this is quite common in "whistleblower" litigation, especially in those cases which do go to trial, and I thus must weigh and evaluate all of the evidence.

First, some general statements are in order herein. This closed record, viewed most favorably toward Complainant and the allegations he has made, leads to the conclusion that Complainant was discharged because of his protected activity. The "whistleblower" provisions of the ERA were passed by Congress specifically to protect such employees from retaliation or discriminatory treatment. A careful review of the testimony, as supported by the documentary evidence, leads to the conclusion that Complainant has sustained his burden and I will now briefly highlight certain crucial items which have led me to rule in Complainant's favor.

As shall be further discussed below, John Mayoras learned, on April 13, 1992, of serious security violations in Respondent's "Access Screening Program" (TR 710, 713, 771) (and Respondent posits in its brief that Mr. Mayoras was the first person to

learn of the security problem). Mr. Mayoras then discussed this problem with Robert Driscoll, Roy Newholm, Gerry Chevalier and Lionel Banda on April 15, 1992. (TR 714, 715) However, these individuals did not advise Complainant, prior to April 21, 1992, about these discussions designed to downplay the seriousness of the problem. (TR 534, 726, 729) Complainant alone pointed out to Mr. Banda the serious nature of these security violations and strongly insisted that corrective action be taken. (TR 728-729)

Complainant testified credibly that he gave to Mr. Banda his notes relating to his interviews of the investigators of the Security Department, as well as a memorandum detailing the corrective steps which should be taken. (TR 116-121) Mr. Mayoras testified that Complainant handed some papers to Lionel Banda in the meeting on April 20 or 21, 1992. (TR 739, 745-46; CX 63) However, Mr. Banda stated that he did "not recall any documentation and (he) certainly know(s) that (he) did not tell him to get rid of any documentation of that nature." (TR 536)

While Mr. Banda had initially advised the Department of Labor on April 9, 1993 that "to (his) knowledge, Roy Newholm did not falsify or backdate documentation nor did he instruct his people to do so" (TR 578; RX 11), this record, even viewed favorably to Respondent, leads to the conclusion that Mr. Banda

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knew about these serious violations on April 21, 1992 after Complainant gave to him his notes about the investigators' statements implicating Roy Newholm, and his memorandum outlining the corrective steps which should be taken immediately. (TR 534, 535)

Finally, Complainant testified credibly that Mr. Banda told him on September 10, 1992, that PSESI was "going out of" the QA/QC business line. (TR 170-171) I specifically reject Mr. Banda's testimony that he advised Complainant that PSESI would be "phasing out" of that business line and would still be servicing existing accounts. First, Mr. Banda testified that he did not "recall utilizing those words (TR 566), but he then testified that we were "(g)etting out of the - - getting out of the issues." (TR 567) He then admitted, in response to intense cross-examination, that he "may have said those words but" that he "intended to tell them that we were restructuring the business." (TR 601-602) Second, PSESI has continued to solicit QA/QC business by submitting bids thereafter in situations in which there was no obligation to do so.

In concluding that the Complainant has established a violation of the ERA, I have resolved all doubts in his favor, especially since the employee protection provision of the Act is a most important part of the statute as codified at 42 U.S.C. § 5851, **et seq**. The purpose of that provision is to avoid a nuclear catastrophe by encouraging employees in the nuclear power industry to report **perceived** safety violations in good faith without fear of retribution or retaliation. **See, e.g., Rose v. Secretary of Labor**, 800 F.2d 563, 565 (6th Cir. 1986)

Such circumstantial evidence, taken together and viewed favorably towards Complainant, thereby effectuating the purposes of the "whistleblower" provisions of the ERA, leads to the conclusion that Complainant was terminated in a discriminatory discharge because he had engaged in protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In 1978, Congress amended the Energy Reorganization Act of 1974 (the "Act") by adding Section 210, which provides a remedy for those employees who believe that they have been discharged or otherwise suffered adverse employment action for making safety complaints concerning the construction or operation of nuclear power plants. 42 U.S.C. § 5851. PSESI is an employer within the meaning of the Act. 42 U.S.C. § 5851(a)(2).

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2. The Act specifically enumerates certain activities which it protects. An employer may not discharge or otherwise discriminate against an employee:

The employee protection provision of the Act provides that:

> (a) **Discrimination against employee**. (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)-
>
> > (A) notified his employer of an alleged violation of the Act . . .;
> > (B) refused to engage in any practice made unlawful by this Act . . . if the employee has identified the alleged illegality to the employer;
> > (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act . . .;
> > (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act . . . or a proceeding for the administration or enforcement of any requirement imposed under this Act . . .;
> > (E) testified or is about to testify in any such proceeding or;
> > (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a

> proceeding or in any other action to carry out the purposes of this Act . . . .

42 U.S.C. § 5851 (Supp. May, 1993).

The allegations in this matter pertain to subsection (A) only. Subsection "A" was added to the statute as a protected activity on October 24, 1992, after the events which gave rise to the instant claim. Energy Policy Act of 1992, Pub. L. 102-486, § 2902(a), 106 Stat. 3123 (1992). Section 2902(i) of Public Law

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102-486 provides that:

> The amendments made by this section [amending this section] shall apply to claims filed under section 211(b)(1) of the Energy Reorganization Act of 1974 (42 U.S.C. § 5851(b)(1) on or after the date of the enactment of this Act.

Accordingly, the timing of the amendment to the Act does not preclude Complainant from bringing the instant claim.

3. Subsection (g) of Section 211 of the Act provides that: Subsection (a) [enumerating categories of protected activity] shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Act ....

42 U.S.C. § 5851(g).

Respondent alleges that subsection (g) renders this statute's protection unavailable to the Complainant because he deliberately caused the issuance of "Good Guy Letters" despite the incompleteness of the requisite reference checks. **See English v. General Electric Co.**, 110 S. Ct. 2270 (1990). However, I find as a matter of law that the claim should not be dismissed under 42 U.S.C. § 5851(g), as Complainant did not order, condone or acquiesce in such security violations, as is discussed further below.

4. Furthermore, the jurisdictional and substantive elements of a retaliation claim under the Act are:

(1) That the party charged with discrimination is an employer subject to the Act;
(2) That the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and
(3) That the alleged discrimination arose because the employee participated in [conduct protected by the Act].

See DeFord v. Secretary of Labor, 700 F.2d 281, 285 (6th Cir. 1983); **Hill v. TVA**, 87-ERA-23 (July 24, 1991). The principal issue in this case, therefore, is causation; namely whether such

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layoff arose *because* he engaged in protected activity.

In terms of whose burden it is to prove unlawful retaliation under the Act courts have referred to the "pretext" analysis set forth by the Supreme Court of the United States in **McDonnell Douglas v. Green**, 411 U.S. 792 (1973). If the employee establishes the elements of a **prima facie** case, then the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. **See Moon v. Transport Drivers, Inc.**, 836 F.2d 226, 229 (6th Cir. 1987). If the employer so articulates, then the employee bears the ultimate burden of proving that the proffered reason is pre-textual. **Id.** The burden of persuasion, therefore, at all times rests with the employee.

5. The Secretary of Labor has endorsed a formulation of the basic allocation of burdens to be applied in cases arising under the Act. **See Dartey v. Zack Co.**, 82-ERA-2 (April 25, 1983). Under **Dartey**, the complaining employee must present a **prima facie** case consisting of a showing that (1) he engaged in protected conduct of which the employer was aware; (2) that the employer took some adverse action against him; and (3) that the evidence is sufficient to raise the inference that the protected activity was the likely reason for the adverse action. **See Montana v. First Federal**, 869 F.2d 100 (2d Cir. 1989); **Hill v. TVA**, 87-ERA-23, Slip op. at 73 (July 24, 1991); **Garn v. Toledo Edison Co.**, 88-ERA-21, Slip op. at 40 (December 27, 1991) ("to establish the **prima facie** case, the employee must merely show that his protected activity was likely the reason for the adverse action.").

One factor that courts deem important in determining whether the employee has made a **prima facie** case of unlawful retaliation or discrimination is whether the employer discharged or otherwise disciplined the employee for engaging in protected activity "so closely in time as to justify an inference of retaliatory motive." **Couty v. Dole**, 886 F.2d 147, 148 (8th Cir. 1989) (termination occurred thirty days after protected activity), **citing Womack v. Munson** 619 F.2d 1292. 1296 (8th Cir. 1980) (twenty-three days), **cert. denied**, 450 U.S. 979 (1981); **Keys v. Lutheran Family and Children Services of Missouri**, 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). These cases provide examples of when the duration of time between protected conduct and adverse employment action is sufficiently short to give rise to at least an inference of retaliation, thereby allowing the employee to satisfy the requirement of a prima facie case.

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Thus, it is now well-established that the Complainant has the burden of establishing a **prima facie** case of discrimination under the ERA. The Complainant must show, by a preponderance of the evidence that he had engaged in protected activity, that he was subjected to adverse action and that the Respondent was aware of the protected activity when it took the adverse action against the Complainant. In addition, the Complainant must produce evidence sufficient to at least raise an inference that the protected activity was the likely motive for the adverse action. **See Dartey v. Zack Co. of Chicago, supra.** If the Complainant satisfies his burden of presenting a **prima facie** case, the burden of production shifts to the Respondent to produce evidence that the adverse action was taken for legitimate, non-discriminatory reasons. **See Dartey** at 8.

Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. **See** S. Kohn, The "Whistleblower" Handbook 35-47 (1990). Examples of the types of employee conduct which the Secretary of Labor has held to be protected include: making internal complaints to management,[3] reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency, threatening or stating an intention to report alleged violations to such governmental authorities, and contacting the media, trade unions, and citizen intervenor groups about alleged violations. Id.

This claim deals with internal complaints to Respondent's management because on April 20, 1992, Complainant advised Lionel Banda that there were serious and widespread violations in Respondent's "Access Screening Program" for technicians granted unescorted access to nuclear power plants and other public utilities.

The totality of this closed record leads to the conclusion that Complainant reported these violations to the Employer and that he forced the Employer to report these violations to the appropriate governmental authority, such as the NRC, as well as the affected public utilities. Thus, these actions were the "motivating factor" in Respondent's decision to terminate him. **See Consolidated Edison Co. v. Donovan,** 673 F.2d 61, 62 (2d Cir. 1982).

The preponderance of the record evidence leads inescapably to the conclusion that the Respondent fired Complainant, a

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twenty-seven year conscientious, dedicated and loyal employee, solely because Complainant had reported safety violations to the Respondent, that he would not cooperate in a plan or conspiracy to coverup or downplay the violations, that he forced the Respondent to report the violations to the NRC and to the

affected utilities, that Complainant was terminated in an illegal and discriminatory discharge as he would not cooperate in the plan, that cooperating individuals, such as John Mayoras and Roy Newholm, were rewarded with continued employment and significant promotions, that Complainant did not engage in any violations of the Act and that the reasons for Complainant's termination are merely pre-textual.

I shall now specifically consider each aspect of Complainant's **prima facie** claim.

ELEMENTS OF COMPLAINANT'S CASE

A. Engagement in Protected Activity

1. In February 1992, the Share Nuclear Access Authorization Audit Group (SNAAAG) indicated that it would audit the PSESI Security Group in the week of May 4-8, 1992 (or on July 6, 1992 [CX 16]).

2. On April 20, 1992, Complainant notified Lionel Banda, the President of PSESI, that an internal audit of the PSESI Security Department's screening program, revealed violations in the process relating to the granting of unescorted access authorizations. The initial report was made by telephone and then repeated during an office meeting with Mr. Banda on the following day.

3. Following his appointment as President of PSESI, Mr. Lionel Banda instructed Complainant to see that an internal audit of the PSESI Security Group was performed prior to the SNAAAG audit.

4. Licensees, contractors and subcontractors must perform background investigations of all persons who are requesting unescorted access to work in a nuclear power facility, which requirement is mandated by the United States Nuclear Regulatory Commission in 10 CFR 73, Reg. Guide 5.66, accepting nuclear document 89-01. PSESI's Security Department was required to fulfill the 10 CFR 73 background investigations for PSESI technicians before they gained unescorted access to the nuclear

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facility.

5. The two investigators who had been with the security group a period of time, Terry Goodwin and Andrea Bruce, admitted that they had been instructed to issue requests for unescorted access without the required background checks and to backdate the files when the checks were completed.

6. On Friday, April 17, 1992, Mr. Creekmore recorded his interviews of the security group personnel, including Mr. Newholm, and he drafted a memorandum which he intended to give to Mr. Banda as soon as he could see him.

7. Mr. Creekmore attempted to discuss the failure of the security group to meet the requirements of 10 CFR 73 on April 16th and 17th but could not speak to Mr. Banda until Monday, April 20th.

8. On Monday, April 20, 1992, Complainant and Roy Newholm conducted a training session to discuss the PSESI Quality Assurance Program, the PSESI commitment to published security screening procedures and the potential penalties for falsifying security records.

9. On Monday, April 20, 1992, at approximately 2:00 p.m., Complainant spoke to Lionel Banda by telephone and informed him of the very serious nature of the security violations. (TR 115)

10. During the telephone conversation between Mr. Banda and Claimant on April 20th, Mr. Banda informed Complainant that he, Banda, was aware of some minor inconsistencies in the security program as a result of a meeting the prior week on April 13, 1992 with Mr. Newholm, Mr. Mayoras and Gerry Chevalier, the security group Supervisor reporting to Mr. Newholm.

11. Mr. Banda indicated to Mr. Creekmore that he had made a management decision to allow the security group to correct the problem.

12. From April 16, 1992 to the April 20th conversation with Mr. Banda, Complainant had multiple meetings with Mr. Newholm, Mr. Mayoras and Ms. Chevalier, and these individuals did not tell Complainant that a prior meeting on the subject of the security audit had taken place. (TR 116)

13. On April 20, 1992, Complainant talked with Mr. Banda to

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discuss the security investigators' statements set forth in the notes and his April 17, 1992 memorandum to Mr. Banda and Complainant gave both of these documents to Mr. Banda at this meeting.

14. A Nuclear Regulatory Commission (NRC) information bulletin, issued just before April 16, 1992, referred to possible penalties which arise when contractors provide a nuclear utility with information that caused the utility to violate its license, including the assessment of fines and penalties by the NRC against the contractor.

15. The falsification of the unescorted access security files by the Security Group managed by Roy Newholm was a failure to comply with Federal Regulations 10 CFR 73.

16. Mr. Newholm and Mr. Mayoras were summoned to the April 21st meeting to join Mr. Banda and Complainant. When Mr. Banda confronted and asked Mr. Newholm about the problems Complainant had described, they (Banda, Newholm, Mayoras and Chevalier)

indicated that they had not discussed anything of this nature in the prior Wednesday's meeting.

17. The reports to Mr. Banda, to the NRC and to the affected public utilities were done solely at the insistence of Complainant.

18. Complainant informed Mr. Banda that the Security Department had issued unescorted access authorization letters (the "Good Guy Letters") to at least 20 to 25 temporary or full time technicians without completing background checks required by federal regulations.

19. The Nuclear Regulatory Commission has issued regulations mandating that anyone entering a nuclear power facility and who will have unescorted access in that facility must undergo a thorough background check before unescorted access is permissible.

20. Through the Unescorted Access Regulations, 10 CFR 73 and a Reg. Guide published by the NRC to assist in compliance with the regulations, PSESI, as a contractor for a nuclear utility, is mandated to conduct unescorted access background searches and to document all steps prior to issuing a Good Guy Letter to the individual.

21. The PSESI Security Department was in clear and obvious

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violation of 10 CFR 73 and Complainant was the first individual to bring the seriousness of this violation to the attention of the President of PSESI.

22. Complainant, in addition to notifying the President of PSESI, insisted that the utilities affected be notified, as any action done by a utility's contractor which violates federal regulations places the utility's license to operate the nuclear power plant in jeopardy with the NRC, and Complainant insisted that further auditors be brought in to assist in the audit.

23. Complainant informed the managers at ABB, including Mr. Skibitsky, the President of ABB Nuclear Services, the parent corporation of PSESI, during a meeting on April 23, 1992, of the violations of federal regulations by the Security Department at PSESI.

24. Complainant was criticized by Mr. Skibitsky and Banda for making a 10 CFR 50, Appendix B, Section XVI Corrective Action Report to Mr. Schroeder, Head of Quality Assurance for ABB Worldwide.

25. Complainant was assigned to communicate with the Nuclear Utilities at which PSESI had technicians with unescorted access credentials regarding the security issue following the April 23, 1992 meeting with ABB management, and did communicate with the utilities about the security problems.

B. Respondent's Knowledge That Complainant Was Engaged In Protected Activity

1. Complainant advised Lionel Banda, President of PSESI, by telephone on April 20, 1992, of the Security Department's violation of NRC regulations, PSESI Procedures and Utility Procedures for unescorted access authorization.

2. Mr. Skibitsky was aware that Complainant had brought to the attention of Mr. Banda, President of PSESI, the violations of NRC regulations in the PSESI Security Department and that Complainant reported on April 23, 1992 to a meeting of ABB Nuclear Services Managers the nature of the Security Department violations.

3. Mr. Schroeder was aware that Complainant was the Quality Assurance Manager of PSESI and that Complainant had notified him of a concern of sufficient financial commitment to reconstitute the PSESI Security Program, which concern Schroeder,

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as ABB Worldwide Quality Assurance Manager, then brought to Skibitsky, and Skibitsky brought to the attention of Mr. Banda.

4. Mr. Skibitsky and Mr. Banda were aware that Complainant, as Quality Assurance Manager, had notified Schroeder of this concern for sufficient financial commitment to reconstitute the PSESI Security Department.

C. Adverse Actions, Including Discharge, Following Protected Activity

1. On September 10, 1992, Lionel Banda notified Complainant that he was being discharged from his employment with PSESI.

2. Mr. Banda had made the decision to terminate Creekmore in late August, 1992 and held a meeting with Ms. Wargo and legal counsel to discuss the termination of Complainant and the placement of Roy Newholm in the QA/QC function.

3. In October 1992, Complainant applied for the PSESI Security Manager's position, as advertised in **The Hartford Courant**.

4. Complainant, despite his qualifications, was not interviewed or hired as Security Manager at PSESI in the fall of 1992.

5. Complainant was offered a job by George Griffiths as a Client Service Manager for ABB Nuclear Services at the TVA facilities in Chattanooga, Tennessee. Complainant accepted this offer and would have transferred in April or May of 1992, but Lionel Banda asked Complainant and ABB Nuclear Services to delay the transfer until the PSESI Security problem was resolved.

6. In the mid to late summer of 1992, the offer of the Client Service Manager position for ABB Nuclear Services faded away as Respondent's attitude toward Complainant change.

7. George Griffiths, the employee at ABB-Nuclear Services, advised complainant by telephone on October 7, 1992, that he was shocked that complainant had been terminated or laid-off, that he had been told by his supervisors not to discuss Complainant's situation and that Complainant was being made the "fall guy" for the security problems.

8. I specifically reject the Respondent's position that the position as Client Manager at TVA never really existed and

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that the layoff was for legitimate, non-discriminatory reasons, because Randy Wood, a TVA employee, corroborated the testimony of George Griffiths as the latter advised Mr. Wood that Complainant would be the Client Manager for ABB at TVA.

9. Complainant was a loyal, conscientious and reliable employee for the Respondent for twenty-seven (27) years, had a good relationship with personnel at TVA, an entity which is a valued customer of Respondent's services, was initially told that he had the job as Client Manager but then the job offer was rescinded because of his engaging in protected activity.

10. That the job offer and Complainant's acceptance were made verbally is no defense as Complainant, Mr. Banda and Mr. Griffiths had reached an understanding that Complainant would assume that job once the security issue had been resolved. (TR 567)

11. Complainant has been treated in a different and discriminatory manner than those who had not been engaged in protected activity.

12. This disparate treatment can be logically inferred in the meeting Complainant had with Mr. Skibitsky and Mr. Banda in the latter's office in June of 1992, wherein Complainant questioned their commitment to reconstituting the security program.

13. From around July or early August, Complainant observed a significant change in attitude from his senior management, which can euphemistically be called a "cold shoulder." During the same time period, he found it more difficult to contact George Griffiths about the TVA position as Mr. Griffiths became less accessible.

14. Complainant, who had been identified as an employee who was highly promotable and was on a fast track program for promotion and who had a strong performance history in his career with Combustion Engineering and particularly with PSESI where he was seen as a key figure and who had been placed in charge of the President's duties at PSESI during the absences of Jeffrey

Wyvill, PSESI's president until February 27, 1992, found himself shunted aside as the summer of 1992 progressed and when it became apparent that he could not be silenced.

15. Complainant was treated differently than several PSESI employees following his notification of PSESI of violations or

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concerned activity under the Act.

> "If an employer treats an employee differently after learning that the employee has engaged in protected activity, that difference in treatment is sufficient to establish a causal connection between the protected activity and the adverse personnel action." **Schlie and Grossman**, supra, citing **Sims v. Mme. Paulette Dry Cleaners**, 580 F.Supp. 593, [S.D.N.Y. 1984], see also **Capaci v. Katz & Besthoff, Inc.**, 525 F.Supp. 317 [E.D.La. 1981] Aff'd. in part and reversed in part, 711 F.2d 647 [5th Cir. 1983], and other cases cited therein.

16. Complainant was most significantly treated differently than Mr. Roy Newholm because Roy Newholm, as Manager of the PSESI Security Department, had signed unescorted access letters without the background checks required by 10 CFR 73 and PSESI procedures OP 21.1. Further, Mr. Newholm had instructed the Security Department Investigators who reported directly to him to skip steps in the background check requirements and to complete the checks and backdate the documentation when completed.

17. Mr. Newholm knew his actions violated federal law and took them in direct contravention of the legal mandates.

18. When Jack Mayoras discovered the falsification and backdating of "Good Guy Letters" and related Security problems in April of 1992, he insisted the information be brought to Mr. Banda's attention. However, Mr. Newholm, knowing the full scope of the violations of federal law by the PSESI Security Department, failed to inform Mr. Banda in the meeting called by Mayoras of the extent of the problem, and in fact, misrepresented the nature of the problem as mere omissions and discrepancies as opposed to fraudulent acts.

19. Newholm's conduct as the Security Department Manager position cost PSESI between $300,000.00 and $500,000.00 and he had performed poorly as the Manager of PSESI's Security Department.

20. Despite the foregoing track record and while Newholm was removed from the Security Manager's position in April of 1992 for his misconduct, he was continued as a PSESI employee and given various assignments, including utility site work, until he was given responsibility for the Q.C. function in September of 1992.

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21. Complainant, on the contrary, had devoted his working life to ABB-CE-PSESI and had never let down the company. In September of 1991, Complainant was laid-off and Mr. Banda did not look for another job for Complainant, and did not give Complainant the Q.C. function, but gave it to Roy Newholm, the individual who at least should have been suspended for his actions.

22. Complainant applied for and did not receive the Security Manager's position despite his intricate knowledge of the federal regulations, PSESI procedures and the people, files and business needs of PSESI pertaining thereto.

23. Respondent provided no interim work for Complainant at utilities as a Staff Augmentation temporary employee as had been done for Mr. Newholm, Mr. Mayoras and Mr. Silver.

D. Temporal Relationship between the Protected Activity and the Termination

1. I reject the Respondent's thesis that the lapse of time of almost five months between the protected activity, **i.e.**, April 20, 1992, and the notification to Complainant of his layoff on September 10, 1992 "precludes the inference of a causal link based on timing," Respondent citing **Meredith v. Beech Aircraft Crop.**, 59 FEP Cases (BNA) 962 967 (D. Kan. 1992) (four months "between the protected activity and the alleged retaliation precludes a finding of causation").

2. I specifically find and conclude that Mr. Banda, as of mid-to-late August of 1992, had decided to terminate Complainant, that discussions then took place with appropriate personnel at various levels and at various departments as to the procedure to be followed in implementing the decision, apparently in view of his whistleblowing activities I infer, and that Complainant was notified of this decision on September 10, 1992.

3. As already found above, Complainant's first notice to management of a suspected violation of NRC Regulations occurred on April 20, 1992. Subsequent communications of NRC regulatory security problems occurred between April 21, 1992 to early June of 1992 when the Schroeder notification occurred. While Complainant's formal termination took place on September 10, 1992, Mr. Banda had made up his mind in late August to discharge Complainant and to place Mr. Newholm in the QC function and the only remaining item related to the effectuation of the

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termination.

4. The greatest period of time is from April 20, 1992 to September 10, 1992, or less than five (5) months. Five months has been held to be a close enough temporal relationship to be a

causal relationship between protected activity and retaliatory discharge. **Thermidor v. Beth Israel Medical Center**, 683 F.Supp 403 (S.D.N.Y. 1933).

5. However, the actual period of time from the last distinct act of protected conduct occurred in early June of 1992 and the decision to terminate Complainant was made in late August 1992, less than two and one half months apart.

6. Additionally, Mr. Banda was away for over sixteen (16) days from late July to early August and he testified that he began thinking of replacing Complainant in late July or early August because of his interest in the TVA job.

7. It is well-settled that temporal proximity is sufficient as a matter of law to establish the final required element of a **prima facie** case - that of causation of retaliatory discharge. **Keys v. Lutheran Family and Children's Services of Missouri**, 668 F.2d 356, 358 [8th Cir. 1981]; **Womack v. Musen**, 618 F.2d 1292, 1286 & N. 6 [8th Cir. 1980]; **cert. denied**, 450 U.S. 979, 101 S.Ct 1513, 67 L.Ed 2nd 814 [1981]; **Davis v. State University of New York**, 802 F.2d 638, 642 [2d Cir. 1986]; **Mitchell v. Baldrich**, 759 F.2d 80, 86 [D.C. Cir. 1985]; **Dominic v. Consolidated Edison Co. of New York**, 822 F.2d 1249 (2d Cir. 1987) (considering retaliatory action claim for firing that occurred three months after filing complaint); **Burrows v. Chemed Corp.**, 567 F. Supp. 978, 986 (E.D. Mo. 1983) (holding inference of retaliatory motive justified, where transfer followed protected activity); **Kellin v. ACF Industries**, 671 F.2d 279 (8th Cir. 1982) (holding lower court's finding that **prima facie** case for retaliatory action was established, where EEOC charge was filed in late 1971 and disciplinary measures occurred throughout 1972).

8. The close proximity of time of the discharge to the protected activity will justify the inference of a retaliatory motive in the employer. **Couty v. Dole**, supra [8th Cir. 1989]. The above cases include temporal spacing between the protected activity and the retaliatory discharge of up to five months. **Thermidor, supra.**

9. In view of the foregoing, I find and conclude that the

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temporal relationship exists herein as the decision to terminate. Complainant was made sometime in July of 1992 and all that remained was the timing and method of such termination after the necessary consultations had been concluded.

E. DISCRIMINATORY DISCHARGE

1. I specifically reject the Respondent's position that Complainant was laid-off due to a legitimate, non-discriminatory business decision because of the poor performance of the QA/QC business lines and the necessity of reducing costs as this

position is not supported by this closed record before me.

2. The QA/QC group was performing ahead of other PSESI lines in terms of profit and being under expenses.

3. The security problem cost PSESI between $300,000.00 and $500,000.00 to reconstitute because of the failing and intentional misconduct of Roy Newholm.

4. The reason for future concern over the QC business line was ostensibly related to sales in 1992, when, in fact, a $3,000,000.00 contract was lost because of a disruption in PSESI caused by the security issue and because Complainant had to devote full-time to resolving the security problem.

5. Mr. Banda intended to continue QC work at PSESI and knew that he would need an experienced person to staff this position.

6. Should a legitimate business reason exist to reduce the staff of the QC Group it was clear that one senior position would remain.

7. The reduction of staff in the QC business line did not necessitate the layoff of Complainant, as a senior level position would remain.

8. Complainant was by all measures the most appropriate PSESI employee to staff the QC function following a reorganization in September of 1992.

9. Complainant was a long term employee of CE-ABB-PSESI and during his term of employment was given strong performance reviews and Mr. Banda relied upon Mr. Creekmore to oversee the security problems.

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10. Complainant had an outstanding work history with PSESI and had all the certifications that Mr. Newholm had and was properly qualified for that position.

11. Mr. Newholm had a lackluster record at PSESI, caused the security issue, costing the company $300,000.00 to $500,000.00 in corrective expenses, damaging the company's reputation, misleading the President of the company and causing the loss of a $300,000.00 contract for QC services. Mr. Banda even admitted that Roy Newholm had not performed well as the Security Manager. (TR 609)

12. Any objective comparison of Complainant and Mr. Newholm would result in the selection of Complainant for the QC function which was to and did, in fact, continue in 1992 and 1993.

13. Complainant was fully competent to step into the Security Manager's role in October of 1992 as he had written all

the procedures for the security department's compliance with federal law, as he had overseen the reverification of all the files in the security department and as he knew the staff, the files, the customers and the needs of PSESI.

14. Accordingly, I find and conclude that Complainant would have been retained as a valued employee but for the fact that he had engaged in protected activity, **i.e.**, he vigorously insisted that proper and candid notification be made to the NRC and to the affected utilities and, unlike others such as Roy Newholm, would not cooperate in a plan to refer to those serious security violations as mere gaps in paperwork or omissions or inconsistencies, keeping in mind that this matter involves as many as twenty five (25) improperly-badged individuals who had unescorted access to and within nuclear power plants.

15. I also reject Respondent's thesis that my decision herein, in effect, "second-guesses" the Respondent's business decisions. I do no such thing because my task is to determine whether the Respondent's actions were **bona fide** or were pre-textual. As I have already concluded, my review of the evidence leads to the logical inference that Complainant was terminated because of his protected activity and, thus, Respondent's reasons therefor are, in my judgment, pre-textual.

F. REMEDIES/DAMAGES

As Complainant has found gainful employment through his own

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efforts, he does not seek reinstatement to his former position with Respondent although, in his brief, he seeks "reinstatement if future lost wages are not awarded." (TR 290-291; CX 78) He specifically seeks an award of the lost back pay, the fringe benefits of which he has been deprived and compensatory damages as set forth above. He also seeks an award of "front pay" on the rightful place theory that wrongfully discharged employees are entitled to the benefit of the jobs they would have obtained but for the illegal termination, and in lieu of the remedy of reinstatement. **Shore v. Federal Express Co.**, 777 F.2d 1155 (6th Cir. 1985); **Davis v. Combustion Engineering Co.**, 742 F.2d 916, 922-23 (6th Cir. 1985).

It is now well-settled that the ERA requires "affirmative action to abate the violation." **42 USC §5851(b)(2)(B).** Under the statute and upon request, Complainant is entitled to an award of "costs and expenses (including attorney's fees and expert witness fees) reasonably incurred ... in connection entitled to compensatory damages." **42 USC §5851(b)(2)(B).** Moreover, the purpose of back pay is to make the employee whole, that is, to **restore the employee to the same position in which he or she would have been in if not discriminated against.** Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. **Blackburn v. Metric Constructors,**

Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). Further, interim earnings in replacement employment should be deducted from a back pay award. **Id.** In addition, prejudgment interest on back pay wages is permitted in whistleblower cases. Such interest is calculated in accordance with 29 CFR §20.58(a), at the rate specified in the Internal Revenue Code at 26 USC §6621. **Id.**

The award of back pay effectuates the remedial statutory purpose of making whole the victims of discrimination, and "unrealistic exactitude is not required" in calculating back pay and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." **EEOC v. Enterprise Ass'n Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **Steamfitters Local No. 6348**, 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied**, 430 U.S. 911 (1977), **quoting Hairston v. McLean Trucking Co.**, 520 F.2d 226, 233 (4th Cir. 1975). Initially, the Complainant bears the burden of establishing the amount of back pay that a respondent owes. **Adams v. Coastal Production Operation, Inc.**, 89-ERA-3 (Sec'y Aug. 5, 1992). Once the Complainant establishes the gross amount of back pay due, the burden shifts to the Respondent to prove facts which would mitigate that liability.

Lederhaus v. Donald Paschen & Midwest Inspection Service Ltd., 92-ERA-13 (Sec'y Oct. 26, 1992), slip. op. at 9-10; **Moody v. T.V.A.**, Dept of Labor Decisions, Vol. 7, No. 3, p. 68 (1993).

Regulations implementing the ERA should be read to give full redress for a violation of the employee protection provision because the ERA has a "broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality." **Mackowiak v. University Nuclear Systems, Inc.**, 735 F.2d 1159, 1163 (9th Cir. 1984).

As indicated above, Complainant seeks damages in this action for lost wages, future lost wages in lieu of reinstatement or, reinstatement if future lost wages are not awarded, losses arising as a consequence of his termination in identifying and obtaining new employment, in travelling to new employment, in relocating his family to new employment, in costs of relocating his home, in bank and other fees in purchasing a new home and selling his previously existing home, expenses in seeking new employment, medical expenses, excess taxes, lost compensation, lost wages during the course of the hearings, lost vacation time, consequential damages for emotional distress, physical injury, physical pain and suffering, injury to reputation, mental anguish, the heart attack he has suffered, attorney's fee and litigation expenses and other matters as this court finds appropriate arising from the retaliatory termination. The statutory authorization authorizes the Court to award compensation including back pay; restoration of the terms, conditions and privileges of the prior employment; and compensatory damages to the Complainant.

The statute allows "abatement of discrimination, restoring an employee to his job with all attendant benefits including back pay, or compensatory damages, and an award of all reasonable expenses incurred in pursuit of the action." **Deford v. Secretary of Labor, supra** at 289. The use of compensatory damages in Section 5851 is intended to include not only such things as retirement benefits, but also medical expenses and other damages incurred in connection with physical ailments suffered by the employee resulting from the embarrassment and humiliation accompanying the discriminatory act. 79 ALJ Fed. 631, Section 6, **citing Deford v. Secretary of Labor, supra,** according to Complainant's thesis.

Complainant concedes that he has a duty to mitigate damages by making a reasonable effort to find comparable employment. **See, e.g., Ford Motor Company v. EEOC,** 458 U.S. 291, 102 S.Ct. 3057 (1982).

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The plaintiff may recover lost fringe benefits, lost pension fund benefits and thrift plan contributions. **Gorrill v. Icland Air,** 761 F.2d 847 (2d Cir. 1985); **Laffey v. Northwest Airlines, Inc.,** 642 F.2d 578 at 588-589 **(D.C. Cir. 1980); Loeb v. Textron, Inc.,** 600 F.2d 1003 **(1st Cir. 1979).** In order to make a Complainant whole, he should be compensated for pension benefits lost through his wrongful termination. "Pension benefits . . . are an integral part of employee's compensation package, and indeed are generally referred to as deferred compensation. Because of the paramount importance of pension benefits to an employee's future financial security, it would be unfair to exclude them from a calculation of front pay. An employee illegally discharged near the end of his working career is particularly vulnerable to suffering economic injury in the form of lost pension benefits. If he secures subsequent employment he will often be unable to work the number of years required for vesting under the new employer's pension plan, and thus will receive no pension benefits for his last few years of employment. **Blum v. Whitco Chemical Corp.,** 829 F.2d 367 at 374 (3d Cir. 1987); **see also Graefenhain v. Pabst Brewing Company,** 49 F.E.P. Cases 840. Wrongfully discharged employees can be awarded 'front pay' on the rightful place theory that wrongfully discharged employees are entitled to the benefit of the jobs they would have obtained but for the discharge, and in lieu of the remedy of reinstatement. **Davis v. Combustion Engineering,** 742 F.2d 916, 922-923 (6th Cir. 1984); **Shore v. Federal Express Corp.,** 777 F.2d 1155 (6th Cir. 1985). The trial court, in its discretion, may grant front pay in lieu of reinstatement where appropriate facts exist. **Mitchell v. Robert Demario Jewelry, Inc.,** 361 U.S. 288 at 291, 4 L.Ed.2d 23, 80 S.Ct. 332 [1960]. Victims of retaliatory discharges in violation of public policy should be allowed to receive front pay in lieu of reinstatement. **Goins v. Ford Motor Company,** 131 Michigan App. 185 (1983). To determine future lost wages, the court may review the employee's

past employment history and the regularity of any wage increases which he can project forward. The trier of fact may consider inflationary factors which would require an upward adjustment, the relevant number of years remaining for the employee before retirement, employee's seniority, and the average date of retirement for men and women," according to Complainant.

Complainant also seeks an award of compensatory damages and "The measure of compensatory damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation." 25 **Corpus Juris Secundum**, Section 71.

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Compensatory damages may include general damages for mental anguish and for physical pain and suffering, and can include injury to reputation as a compensable psychic injury, which is a portion of the emotional distress damages and may include mental anguish, emotional strain and mental suffering. Nahmod, **Civil Rights and Civil Liberties Litigation, Section 4.03, "Compensatory Damages".** The Seventh Circuit has taken the approach, when awarding damages in wrongful discharge cases, to look at the range of awards previously made. **Fleming v. County of Kane, State of Illinois**, 898 F.2d 553 (7th Cir. 1990).

Complainant's attorney also seeks approval of an attorney's fee as such fees are specifically authorized by the Act. The standards for determining what constitutes a reasonable attorney's fee should be drawn from decisions under Title VII and 42 U.S.C. Section 1988. **Modjeska Employment Discrimination Law, Second Edition, Section 519. See generally Bloom v. Stenson**, 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1514 (1984). "The general rule is that hours recently spent on successful claims and those sufficiently related thereto will be multiplied by a reasonable rate to produce the lodestar amount." **Modjeski, supra, citing Fite v. First Tennessee Production Credit Association**, 861 F.2d 887 (6th Cir. 1988). Upward allowances have been allowed where counsel had a contingency fee agreement and had worked in a small firm. **See Fite, supra; Wildman v. Lerner Storage Corp.**, 771 F.2d 605 (1st Cir. 1985). "The amount due counsel under contingent fee agreement does not impose a ceiling on the amount of attorney's fee the court may award." **See Modjeska, supra, citing Herold v. Hajoca Corp.**, 864 F.2d 317 (4th Cir. 1988).

Initially, I find and conclude that Complainant's June 5, 1993 heart attack is causally related to his termination as the natural sequela of his September 10, 1992 discriminatory discharge and the resulting emotional stress thereafter. He filed his complaint in February of 1993 and learned, on or about March 23, 1993, that the Administrator had concluded that his complaint was meritorious. The hearing began on May 4, 1993 and additional testimony was taken on May 5,6,7 and 12, 1993. A reconvened hearing was originally scheduled for June 9, 1993 to take testimony from witnesses who were unavailable for the earlier sessions. However, the reconvened hearing had to be

postponed due to Complainant's heart attack and testimony was resumed on July 26, 1993. (ALJ EX 10)

While Dr. Parker and Dr. Gore differ as to their basic conclusions on the etiology of Complainant's heart attack, I shall credit and accept the July 20, 1993 opinion of Dr. Parker,

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Complainant's treating cardiologist, "that the major contributing factor to Complainant's present heart attack was the stress he was undergoing as a result of his termination from his employment in September, 1993, and the resulting turmoil in his life." (CX 70)

On the other hand, while Dr. Gore, the Respondent's medical expert, found significant the lapse of almost nine months between the termination and the heart attack and while the doctor opined "that it is improbable that the cause of Complainant's heart attack was his being laid off from work," I find most persuasive the doctor's acknowledgment that Complainant "had multiple well known risk factors for heart disease that lead (SIC) to his myocardial infarction." (RX 48) Moreover, the doctor's deposition disclosed that Complainant's May, 1992 electrocardiogram, a full four months prior to his termination, was read as abnormal.

Complainant's abnormal EKG establishes a pre-existing cardiac condition as of May of 1992 and such condition, together with his acknowledged cardiac risk factors, was aggravated, accelerated and exacerbated by his September 10, 1992 termination, and the resulting emotional stress, including the stress generated during this proceeding, especially confronting and testifying in open court against his superiors and former colleagues, directly caused his June 5, 1993 heart attack. In so concluding, I have accepted and credited certain well-recognized principles of workers' compensation law, which I shall now briefly cite.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor,** 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.,** 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation,** 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP,** 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries,** 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company,** 22

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BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra; Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In this case, I find and conclude that Complainant's discriminatory discharge on September 10, 1992, and the emotional stress thereafter for the next nine months, directly caused his heart attack on June 5, 1993. Complainant apparently was a cardiac risk as perhaps a "Type A" individual and it is well settled that the employer takes each employee "as is" and with all of his/her human frailties. In this regard, **see, e.g., Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); **Vandenberg v. Leicht Material Handling Co.**, 11 BRBS 164, 169 (1979).

As generally stated above, Complainant seeks the following damages herein and he has submitted this **Prayer For Relief (CX 79):**

1.	Lost Wages Atlantic Group (P.F. #243, 121)	$ 67,830.00
2.	Lost Wages related to TVA job ($5,400.00 per year) (P.F. #120, 131, 130)	39,600.00
3.	Loss of regular and pension credits (P.F. #241)	146,728.00

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4.	Loss growth on pension sum paid (P.F. #241)	177,550.00
5.	Loss of Prism Savings (P.F. #242)	34,958.00
6.	Lost wages during trial (,173.00 per week) (P.F. #132)	2,346.00
7.	Lost vacation (P.F. #133)	31,925.00
8.	Loss of equity on house (P.F. #122)	68,500.00
9.	Loss related to realty fees, closing costs and fees (P.F. #123)	10,125.00
10.	Medical payments (P.F. #125)	1,050.00
11.	Virginia bank payments for new house (P.F. #124)	7,500.00
12.	Job search expenses (P.F. #126)	2,000.00
13.	Travel expenses to and from Virginia (P.F. #127)	2,240.00
14.	Payments of excess taxes (P.F. #128)	8,800.00
15.	Attorney's fees and costs	50,941.92
	TOTAL	$652,093.92

16. Compensatory damages to be awarded by the Court at its discretion.

17. Respondent, in lieu of future lost wages, will reinstate Complainant in a similar position with all lost wages and benefits restored and appropriate increase in salary.

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18. Respondent will pay all monies due the Complainant, ordered pursuant to the hearing officer's judgment in this matter, within thirty days of said judgment.

With reference to Complainant's **Prayer For Relief**, Respondent submits that Complainant's presentation of the evidence in the record is far from complete. For instance,

nowhere does Complainant inform the Court that he was paid $45,720.00 in severance benefits, or that he had substantial interim earnings prior to joining the Atlantic Group. (TR at 1121; RX 23) Granted Complainant has the right to present a persuasive argument as to his entitlement to damages, and the extent to which he has suffered. However, the incompleteness of his damages estimate, in that there is no mention of the tens of thousands of dollars of interim earnings which must be deducted from any damage calculation, speaks to the larger issue of the general unreliability of his presentation of the evidence in the record, according to Respondent.

At the outset, Respondent submits that because of a generous severance policy, substantial interim earnings, PSESI's responsible and professional conduct in light of a difficult business predicament, and especially Creekmore's failure to mitigate his damages, there would be few, if any, damages awardable in this case.

Respondent concedes that an aggrieved employee who proves a violation of the Act may be entitled to reinstatement together with a restoration of the terms, conditions and privileges of his employment, including back pay. **See** 42 U.S.C. § 5851(b)(2)(B). The employee is not, however, entitled to any newly created privileges of employment. **Deford v. Secretary of Labor**, 700 F.2d 281 (6th Cir. 1983). Also, Congress did not make punitive damages available to prevailing employees. **See English v. General Electric Co.**, 683 F. Supp. 1006 (E.D.N.C. 1988).

As is true in discrimination cases generally, as well as the common law of employment contracts, any award of back pay or other damages must be reduced by interim earnings or amounts earnable with reasonable diligence. **See, e.g.**, 42 U.S.C. § 2000e-5(g); **Nord v. United States Steel Corp.**, 758 F.2d 1462 (11th Cir. 1985) (interim earnings to be deducted from back pay award because plaintiff is not entitled to be made more than whole).

As noted above, Complainant became employed by the Atlantic Group in Norfolk, Virginia in late February 1993, earning a

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salary $5,400 less per year than his $66,040 per year salary at PSESI. (TR at 202, 257, 272; RX 23)

Complainant also worked as a consultant following his employment at PSESI for $45 per hour, beginning around December 22, 1992 and lasting until his hire at the Atlantic Group. (TR at 199, 379) In addition, he accepted a number of temporary positions at other ABB organizations and outside ABB between the date of his termination, September 10, 1992, and his hire with the Atlantic Group. (TR at 1121) Any damages that he may be awarded must be offset by his earnings at his current job, as well as the money that he earned working as a consultant, according to Respondent.

As noted above, Complainant was also paid severance benefits upon his termination from PSESI and this weekly benefit of ,270 was paid from September 27, 1992 until May 29, 1993. (RX 23) This amounts to a total severance benefit of $45,720.00

Respondent makes the following comments relating to the items claimed by Complainant:

1. Lost Wages Atlantic Group

Complainant is projecting the wages that he lost by taking a job with the Atlantic Group, which pays $5,400 less per year than his position at PSESI, fifteen years into the future. As more fully set forth in Respondent's Brief, the statute is silent as to the availability of front pay, and Complainant has not proven sufficient facts to show that front pay in this case is appropriate. **See** Brief at 39-40, n.12. Complainant by failing to distinguish between back pay and front pay, has muddled the issue of damages. For example, if liability is found, interest is only awarded on back pay, not front pay.

2. Lost Wages related to TVA job ($5,400/year)

Complainant was never promised or offered this position, as testified by both Messrs. Skibitsky and Griffiths. Like the foregoing damages caused by his lower salary at the Atlantic Group, this figure represents front pay. More important, nowhere does Complainant inform the Court that these damages are for precisely the same time period as those set forth above. Not only would such damages fifteen years into the future be highly suspect and speculative, but they are completely duplicative of the previous category of damages.

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3. Loss of regular and pension credits

4. Loss growth on pension sum paid

5. Loss of PRISM savings

Another element of damages which Complainant seeks, lost pension benefits, derives from the fact that he does not have a pension plan with his new employer, which he did have with PSESI.[4] On this point, both parties retained the services of actuaries, both of whom were certified by the Court to be experts in their field. (TR at 1233-34, 1288-89) Each expert prepared reports which have been admitted into evidence in this record. CX 72 (Report of Alan C. Goddard, introduced by Complainant); RX 46 (Report of Peter M. Carroll, introduced by Respondent). Although those reports speak for themselves, the Carroll report (RX 46) explicitly differs with certain assumptions made in the Goddard report (CX 72), and explains fully the basis for those difference.

To summarize several of the differences, the Goddard

report's calculations assume that Complainant would work to age 65. The Carroll report, however, relies upon actual data gathered by studying 777 participants in the ABB plan, the plan in which Complainant had at one time been a participant. That data indicated that age 59 was a more appropriate and supportable possible retirement age in performing these calculations.

Second, the Goddard report calculated Creekmore's lost benefits from the Personal Retirement Investment and Savings Management Plan (PRISM). Yet, Creekmore *never* participated in this plan, and thus is in a very poor position to claim that he was somehow deprived of his former employer's matching contributions that would only have been triggered by his participation. (TR at 1320) Finally, the Goddard report makes a gross miscalculation with regard to the interest that Creekmore would have earned had the $102,044 pension lump sum that he was paid upon his termination from PSESI remained in the ABB Cash Balance Plan. **See** RX 46 at 3 n.3. In any event, Creekmore's termination in no way prevented him from earning interest on the lump sum payment, which he could have earned had the $102,044 pension lump sum that he was paid upon his termination from PSESI remained in the ABB Cash Balance Plan. **See** RX 46 at 3 n.3. In any event, Creekmore's termination in no way prevented him from earning interest on the lump sum payment, which he could have (and may have) invested and earned upon receipt.

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The following summarizes the findings of the Carroll report, which respondent submits is the more accurate report of the lost pension benefits to which Creekmore claims to be entitled:

1.	Projected Cash Balance at age 59	$240,684.37
2.	Value of PERB at age 59	57,203.76
3.	Total Projected Pension Benefits (1 + 2)	297,888.13
4.	Present Value of Item 3, on 12/1/92	151,913.14
5.	Amount Paid, 12/1/92 (RX-22)	102,044.00
6.	Present Value of Additional Pension Benefits (4 - 5)	49,889.14

It is readily apparent that by deducting the $45,720.00 in severance benefits that Creekmore was paid, the value of lost pension benefits all but disappears. Upon further subtraction for the very substantial interim earnings to which Creekmore testified, and given the very small difference in salaries between Creekmore's current position and his position with PSESI, it is apparent that in terms of lost salary and benefits, there are virtually no damages awardable in this case, should the Court make the very unlikely finding that Creekmore was terminated because of his protected activities, according to Respondent.

6. Lost wages during trial

Respondent is aware of no authority which provide for lost wages to an employee which were necessitated by that employee's attending a legal proceeding which he himself brought.

7. Lost vacation

Again, this figure is a highly speculative projection extending fifteen years into the future. It is not even reduced to a present value, and thus in addition to its being legally impermissible front pay, which is too speculative to be awarded, Creekmore's failure to reduce it to a present value destroys any relation it may have had to a realistic estimate of the damage.

8. Loss of equity on house.

As noted in the underlying brief, Complainant declined to interview for a position with ABB, Inc. in January 1993 at a time when he was still without permanent employment. **See** Respondent's Brief at 16-18. That position was located in Windsor, Connecticut, at the same location of his former position with PSESI.

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Furthermore, the evidence in the record does not support the loss that Complainant is claiming. Nowhere in this record does it state what Creekmore paid for his house, or how much equity he had in the house. The only data that he provides is an appraisal of $175,000 and a sales price of $130,000. Those figures say absolutely nothing about loss of equity, and there is no evidence as to the date of the appraisal.[5] There is no evidence in this record by which the Court can calculate any loss of equity in Creekmore's Connecticut home.

9. Payment of excess taxes

Complainant is seeking recovery for the taxes that he had to pay for taking a distribution of his retirement to pay debts that he had incurred before his termination from PSESI. This goes far beyond any permissible recovery. Taking the distribution was of his own volition, and the debts that he paid had nothing to do with, and in fact predated his termination.

Respondent concedes that the Act does permit recovery of compensatory damages, which could include special damages such as medical costs, but also general damages such as pain and suffering and emotional distress. **See DeFord v. Secretary of Labor**, 700 F.2d 281 (6th Cir. 1983), **cited in DeFord v. TVA**, 90-ERA-60, Sl. op. at 52-53 (1992). The Administrative Law Judge in **DeFord** noted that with regard to subjective losses such as pain and suffering, the complainant carries the burden of establishing both the existence and the magnitude of these injuries. **DeFord**, Sl. op. at 53 (**citing Busche v. Burkee**, 649 F.2d 509, 519 (7th Cir. 1981). Moreover,

there must be a causal connection between the existence of the loss and the employer's illegal acts. **Id.** Finally, the amount of the award should resemble awards for such injury in similar cases. **Id. (citing McCuiston v. TVA**, 89-ERA-6 (Secretary of Labor Nov. 13, 1991) (objective symptoms accompanying employer blacklisting of employee warranted $10,000 award of compensatory damages); **DeFord v. TVA**, 81-ERA-1 (1984) (award of $10,000 reasonable where complainant suffered chest pain, nausea, insomnia, as a result of embarrassment and humiliation accompanying his demotion). A common link in the cases in which general damages are awarded is particularly egregious and harmful conduct by the employer, accompanied by proof of objective symptomology by the complainant.

In this case, however, Respondent submits that Mr. Banda never reprimanded or chastised Complainant in any way. (TR at 328,539) In fact, other company officials expressed a desire for

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him to return. The employer in this case has not acted in a manner that warrants compensatory damages of any kind. Comparison with those decisions in which general damages were awarded requires a rejection of such claim, according to Respondent's thesis.

However, the fact remains that the Respondent did not rehire Complainant and, as I have already found above, the Respondent had at least three opportunities to retain and/or rehire Complainant and consistently refused to do so, while retaining and promoting to responsible positions Roy Newholm, and the others who cooperated in the plan. Such discriminatory and egregious conduct cannot be sanctioned and Complainant is entitled to an award of the damages if permitted by the Act.

This Administrative Law Judge, in resolving Complainant's entitlement to compensatory damages and the extent thereof, is guided by certain well-settled principles in the area of compensatory damages law. Compensatory damages are awarded **to make good or replace the loss caused by the wrong or injury and are confined to compensation.** While the purpose of awarding compensatory damages is not to enable the injured or wronged party to make a profit on the transaction, compensatory damages involve the quantum of hurt to a plaintiff resulting from the injury or wrong. The general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission but he is not responsible for the remote consequences of his wrongful act or omission. Natural consequences are such as might reasonably have been foreseen, such as occur in an ordinary state of things. Thus, it is often said, if according to the usual experience of mankind the result was to be expected, it is not too remote.

An act or omission is the proximate cause of a loss where there is no intervening, independent, culpable and controlling cause severing the connection between the wrongful act or

omission and the claimed loss. Thus, an intermediate cause which, disconnected from the primary act or omission, produces the injury or loss will be regarded as the proximate cause. It is sufficient if it is established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result. Moreover, although an act of the plaintiff has intervened between defendant's wrong and the injury suffered, the defendant is not thereby excused if the intervening act was the result of or was naturally and reasonably induced by his earlier wrong. While the plaintiff is not entitled to recover damages for conditions which are due entirely

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to a previous disease, the defendant may be liable for damages if his wrongful act aggravated or exacerbated such disease or impairment of health. Thus, the wrongdoer is not exonerated from liability if, by reason of some pre-existing condition, his victim is more susceptible to injury and the plaintiff may recover such damages as proximately result from the activation or aggravation of a dormant disease or condition. Heart disease was recognized as a pre-existing condition in **Firkol v. A.R. Glen Corp.**, 223 F. Supp. 163 (D.C.N.J. 1963). As between an innocent and a wrongful cause, the law uniformly regards the latter as the proximate and legally responsible cause.

It is also well-settled that damages which are uncertain, contingent or speculative in their nature cannot be recovered as compensatory damages. Where a cause of action is complete and no subsequent action may be maintained, a recovery may be had for prospective and anticipated damages reasonably certain to accrue. Thus, damages are not restricted to the period ending with the institution of the suit and where it is established that there will be future effects sustained by the plaintiff as a result of the wrongful act or injury, damages for such effects may be awarded. The rule of "avoidable consequences," which is supplementary to the rule that a wrongdoer is responsible for the consequences of his misconduct, and is distinguishable from contributory negligence, imposes a duty on the injured person to minimize damages. Thus, no recovery may be had for losses which the injured person might have prevented by reasonable efforts and expenditures.

In general, one injured by another's wrong is entitled to compensation for all peculiar losses sustained and the burden of such losses falls on the party who occasioned it. Thus, it is generally declared that loss of earnings, wage, salary or other benefit is an element of damages which should be considered, provided that such earnings are not of a speculative or conjectural nature and that they are proved with reasonable certainty. Future earnings, or probable loss of earnings in the future, may be awarded if shown with reasonable certainty and are not speculative in character. Moreover, loss or impairment of earning capacity is a proper element of compensatory damages.

Stated differently, there may also be a recovery for loss of profits shown to be the natural and probable consequences of the

act or omission, provided the amount thereof is shown with reasonable or sufficient certainty and provided they are not speculative, contingent, conjectural or remote. Although generally objectionable for the reason that their estimation is

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conjectural and speculative, anticipated profits dependent on future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. Moreover, the rule as to certainty of showing has been held by some courts not to apply to uncertainty as to the amount of the profits which would have been derived, but to uncertainties or speculation as to whether the loss of profits was the result of the wrongful act, and whether any such profits would have been derived at all.

As a general rule, the plaintiff is entitled to all legitimate and reasonable expenses necessarily incurred by him in an honest endeavor to reduce damages flowing from or following the wrongful act as long as the effort to minimize damages was made in good faith. Moreover, the mere fact that an attempt to minimize damages increases or aggravates the loss does not prevent a recovery for the expenses incurred in making the effort, provided the effort was prudently made and the damages flowing from or following the wrongful act as long as the effort to minimize damages was made in good faith.

It is also well-settled that compensatory damages cannot be used to punish the employer and compensatory damages are those necessary to make a wronged party whole and no more. **Hedden v. Conan Inspection Co.**, No. 82-ERA-3, sl. op. of Administrative Law Judge at 7-8 (1982). The Act is silent on an award of exemplary or punitive damages, unlike the employee protection provisions of the Safe Drinking Water Act [42 U.S.C. §300j-9(i)(2)(B)(ii), and of the Toxic Substances Control Act (15 U.S.C. §2622(b)(2)(B)], which contain specific statutory language giving the Department of Labor the authority to award exemplary or punitive damages in appropriate situation. **See, e.g., Davis v. Hill, Inc.**, No. 86-STA-18, recommended Decision and Order of the Administrative Law Judge at 7 (May 20, 1987), adopted by the Secretary of Labor (July 14, 1987). **See generally Corpus Juris Secundum**, 25 C.J.S., **Compensatory Damages**, §§17-49.

In view of the foregoing, I find and conclude that Complainant is entitled to the following award of back pay and compensatory damages as these damages, except as otherwise noted, resulted directly from his discriminatory discharge on September 10, 1992. I will deal with each specific item sought by Complainant and Respondent's objection thereto:

1. Lost Wages Atlantic Group $67,830.00

Complainant is entitled to this award as I have accepted his testimony that he intends to work until he attains his sixty-

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fifth birthday and as that amount has been reduced to its present

value. However, there is a double recovery for a certain time period as Complainant's severance payments from Respondent ended on May 27, 1993 and he began employment with the Atlantic Group in late February of 1993. Thus, Respondent is entitled to a credit for payments made to Complainant during this overlapping time period as well as for his interim earnings between September 10, 1992 and his employment with the Atlantic Group, during which time he was receiving his severance pay, and these payments should be submitted to this Court as part of Complainant's timely Motion For Reconsideration. Thus, this award shall be deferred for now.

2. Lost Wages related to TVA job ($5,400.00 per year) $39,600.00

However, this award would grant Complainant a double recovery as he has also been granted an award in #1 above and this time period at the TVA job would overlap his employment with the Atlantic Group, thereby resulting in a double payment. (Moreover, if he had been given that job, there would have been no proceeding herein.) Thus, this request is disallowed as "completely duplicative of the previous category of damages."

3. Loss of regular and pension credits $146,728.00

On this item, I have accepted the well-reasoned and well-supported testimony of Alan Goddard, Complainant's pension actuarial expert. That testimony is supported by Complainant's Proposed Finding of Fact #241 and I have found that testimony to be most persuasive. Complainant, in my judgment, is entitled to that award as he has sustained that loss as a direct result of his discriminatory discharge. I do not accept the thesis espoused by the Respondent's pension actuarial expert, Peter M. Carroll, as he has based his calculations on a retirement age of fifty-nine and I have already accepted Complainant's testimony that he intends to work until his sixty-fifth birthday. Moreover, I simply cannot accept Respondent's position "that by deducting the $45,720.00 in severance benefits that Creekmore was paid, the value of lost pension benefits all but disappears" as the law, as summarized above, permits an award of such pension benefits as Complainant has established their amount with certainty and as that loss resulted directly from his illegal termination. In this regard, **see Fleming v. County of Kane, State of Illinois**, 898 F.2d 553 (7th Cir. 1990).

4. Loss growth on pension sum paid $177,550.00

On this item, I also accept Mr. Goddard's opinions and calculations as supported by his documentation. Again, this loss resulted directly from Complainant's discriminatory discharge by the Respondent and Complainant has established that amount with certainty and as he properly reduced the amount sought to its present value with mortality factored therein. **Fleming,**

supra.

5. Loss of Prism Savings $34,958.00

Complainant is not entitled to this award of damages as he did not participate in this program, although eligible to do so, and any award herein would be a windfall. (TR 1319, 1320)

Respondent objects to the awards in numbers 3, 4 and 5 as Complainant actually seeks "front pay," counsel pointing out that front pay is frequently not an appropriate remedy in employment termination cases where reinstatement is already provided as a remedy.

While the Act is silent on the issue of front pay, 42 U.S.C. § 5851(b)(2)(B), front pay is commonly viewed as prospective relief which may be awarded in those cases where reinstatement, which is specifically provided for in the statute, is not an appropriate remedy. **See McCuiston v. Tennessee Valley Authority**, 89 ERA 6 (1991). In **McCuiston**, the Secretary of Labor denied that Complainant's prayer for front pay **be**cause he had not proven that **"a productive and amicable working relationship would be impossible."** (Emphasis added)

Respondent submits that front pay is inappropriate herein as "PSESI personnel tried, albeit unsuccessfully, to assist Creekmore with reinstatement."

However, I have already rejected that argument as I have found and concluded that Complainant was discharged because he had engaged in protected activity and because he would not participate in the cover-up and because the Respondent had at least three opportunities to retain and/or rehire Complainant. However, the Respondent, for its own reasons, has seen fit not to do so and this proceeding resulted. Complainant does not seek reinstatement and the tension between the parties was manifested in the courtroom as Complainant confronted and testified against his former superiors, colleagues and co-workers. Thus, as "a productive and amicable working relationship (is) impossible," Complainant is entitled to the awards he seeks in items 3 and 4.

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6. Lost wages during trial (,173.00 per week) $2,346.00

Complainant, in my judgment, is entitled to an award of these lost wages as that loss was incurred directly as a result of his discriminatory discharge. He had just begun employment with the Atlantic Group and was forced to go on a leave-without-pay status to cover his work absences. While the usual witness fee for attendance at a federal trial is $40.00 per day plus mileage allowances, Complainant is not limited to that amount as he is the prosecuting party and not merely a witness.

7. Lost Vacation $31,925.00

Respondent submits that "this figure is a highly speculative projection extending fifteen years into the future" and "it is not even reduced to a present value" and as Complainant has "fail(ed) to reduce it to a present value." However, in my judgment, the amount sought by Complainant is not speculative and can easily be determined on the basis of the vacation plans offered by the Atlantic Group and by the Respondent (**i.e.**, the Atlantic Group offers two weeks vacation for the first ten years of service then three weeks after (fifteen) years of service," while he "received (four) weeks vacation at PSESI and will lose $31,925.00 in paid vacation due to his loss of vacation time."

However, unlike other amounts sought by Complainant, he does not indicate here whether or not that amount has been reduced to its present value. Thus, I shall defer awarding this amount until such time as Complainant files the appropriate amount by a timely filed **Motion For Reconsideration.**

8. Loss of equity on house $68,500.00

I agree with Respondent's position on this item and Complainant shall timely file additional data to deal with the comments made by Respondents (**i.e.**, "There is no evidence in this record by which the Court can calculate any loss of equity in Creekmore's Connecticut home). Such award, in my judgment, is proper as Complainant lost the equity in house, whatever the amount, as he was forced to sell his house prematurely because of his discriminatory discharge and to avoid the further costs of maintaining two households. However, I shall defer such award until receipt of the appropriate data. I note that Complainant has indicated that the house appraisal is at least two years old.

9. Loss related to realty fees, closing $10,125.00

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costs and fees.

Complainant is entitled to an award of such direct selling costs as those expenses were incurred as a result of his discriminatory discharge.

10. Medical payments ,050.00

Likewise, Complainant is entitled to these expenses as these represent the amount that he had to spend "to cover medical expenses after the PSESI medical benefits were terminated."

11. Virginia bank payments for new house $7,500.00

12. Job search expenses $2,000.00

13. Travel expenses to and from Virginia **$2,240.00**

Complainant, in my judgment, is entitled to an award of those three items as those expenses resulted directly from his discriminatory discharge and, **but for such discharge,** would not have been incurred because Complainant had worked for Respondent for a total of twenty-seven years and would have retired from Respondent, most likely, as the Client Service Manager at TVA or in another and higher management position as he had been a conscientious and loyal employee for those many years and as he had worked his way up the company ladder from his first job in maintenance to other positions of responsibility.

14. Payments of excess taxes **$8,800.00**

Respondent objects to this amount as Complainant "is seeking recovery for the taxes that he had to pay for taking a distribution of his retirement to pay debts that he had incurred before his termination from PSESI. That goes far beyond any permissible recovery." I disagree. Complainant found himself, on September 10, 1992, without a job after twenty-seven (27) years of conscientious and loyal service and, while he would be receiving severance pay until May of 1993, he was without a steady job, was unsure of his future at age fifty, had to take several short term jobs on an hourly contract basis and had to take an immediate and premature distribution of his retirement to pay certain debts to keep his family afloat and his creditors at bay. The amount of $8,800.00 represents the excess taxes he had to pay for that premature withdrawal, a withdrawal resulting as the natural and unavoidable consequences of his illegal

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termination. Thus, Complainant, in my judgment, is entitled to such amount as that payment resulted as a direct effect of his discriminatory discharge.

15. Attorney's fees and costs **$50,941.92**

Attorney Robert W. Heagney is awarded that amount for the thorough and professional manner in which he has successfully presented this claim. Mr. Heagney has submitted a fully-itemized fee petition and the petition, as filed, is, in my judgment, reasonable and proper. Such fee award is specifically permitted by the Act. Mr. Heagney may submit a supplemental fee petition relating to his reply brief and any **Motion For Reconsideration** which may be filed.

16. Compensatory Damages $40,000.00

It is now well-settled that "the measure of compensatory damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation." **25 Corpus Juris Secundum,** Section 71. Compensatory damages may include general damages for mental anguish and for physical pain and

suffering, and can include injury to reputation as a compensable psychic injury, which is a portion of the emotional distress damages and may include mental anguish, emotional strain and mental suffering. Nahmod, **Civil Rights and Civil Liberties Litigation**, Section 4.03, "Compensatory Damages." The Court of Appeals for the Seventh Circuit has taken the approach, when awarding damages in wrongful discharge cases, to look at the range of awards previously made. **Fleming v. County of Kane, State of Illinois**, 898 F.2d 553 (7th Cir. 1990). In **Fleming**, the Court approved $40,000.00 as within the range for the emotional distress arising from the discriminatory discharge.

In **Fleming**, the final damage award, in the amount of $157,574.19, was comprised of the following elements: $87,283.99 for lost , past and future earnings; $30,290.20 as compensation for Fleming's premature withdrawal from his annuity; and $40,000.00 for emotional distress, reduced from $120,000 by the $80,000 remittitur. The Court approved the award of $40,000 for Fleming's emotional distress as the "record in (that) case does show a rational connection between the evidence and the damage award," the Court noting that the jury accepted Fleming's testimony "describing (his) humiliation at being subjected to defendants' adopted course of 'progressive discipline'," his "embarrassment and humiliation at being reprimanded in front of his fellow employees, some of whom he had worked with for many

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years," the "depression he suffered during the period in question, as well as to serious headaches and sleeplessness," as well as his doctor's testimony "that the job stress which Fleming experienced during this period may have resulted in an aggravation of his physical condition." **Fleming**, **supra** at 562.

Moreover, that Court's "review of those cases (wherein damages for emotional stress are sought) led us to the conclusion that damage awards in this context have ranged from 500 to over $40,000. Mr. Fleming was awarded $40,000 for emotional distress. Although this award falls within the upper limits of that range, we do not conclude that it is out of line with other cases in similar contexts. **See**, **e.g.**, **Ramsey v. American Air Filter Co.**, **Inc.**, 772 F.2d 1303, 1313 (7th Cir. 1985) ($35,000 was determined to be outermost award that could be supported by the record in §1981 race discrimination case)." **Fleming**, **supra** at 562.

In view of the foregoing precedents, I hereby award Complainant the additional amount of $40,000.00 as compensatory damages for the emotional pain, mental anguish and the emotional stress he has experienced herein, as well as the damage to his reputation in the nuclear power industry, an industry which requires impeccable personal credentials, **beginning** in May or June of 1992, at which time the Respondent, through its management and other personnel, began to give him the "cold shoulder," **leading** to his discriminatory termination on September 10, 1992, to his confrontation with his superiors, co-

workers and colleagues beginning with the filing of his complaint in February of 1993, continuing on and after May 4, 1993 and in the courtroom and **culminating** in his heart attack on June 5, 1993.

RECOMMENDED ORDER

Accordingly, I find and conclude that Complainant is entitled to relief under the Act because adverse action was taken by Respondent with respect to Complainant's employment status in violation of the Act.

CONCLUSION

For the reasons set forth above, this Court finds that (1) Complainant was discharged from his employment with Respondent and that he was the subject of adverse employment action, (2) Complainant has established that he was engaged in protected activity under the Act, (3) Complainant established a **prima facie** case of retaliatory discharge by Respondent and (4) Respondent's witnesses were, in certain material respects, less that candid to such an extent that I have credited Complainant's version in those areas of inconsistencies.

REMEDY

Complainant does not seek reinstatement with the Respondent. He is entitled to the specific damages awarded herein plus appropriate interest, commencing on September 10, 1992, the date and continuing until such time as Respondent pays the amount of the award to Complainant. Appropriate interest shall be paid on the award in accordance with 26 U.S.C. §6621. **Park v. McLean Transportation Services, Inc.**, 91-STA-47 (Sec'y June 15, 1992).

Complainant has sustained his burden of mitigating damages as he immediately accepted temporary employment, on a contract basis, and accepted the first offer of permanent employment made to him by Atlantic Group.

Accordingly, Complainant is entitled to an award of damages and compensatory damages in the amount of $398,339.00, as specifically discussed and awarded above, from September 10, 1992 to the date of actual payment, including appropriate interest thereon.

Complainant is also entitled to a provision herein directing that Respondents immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's work for the Respondents and his

termination on September 10, 1992. Respondent shall also provide neutral employment references when inquiry is made about Complainant by another firm, or entity or organization or individual.

ORDER[6]

It is therefore **ORDERED** that Respondent shall pay to Complainant the amount of $398,339.00 commencing on September 10, 1992 and continuing until payment of the award by Respondent, plus appropriate interest at the IRS rate, computed until the date of payment to Complainant.

It is further **ORDERED** that Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's employment with the Respondents and his termination on September 10, 1992. Respondent shall also provide neutral employment references when inquiry is made about Complainant by another firm, entity, organization or an individual.

It is further **ORDERED** that Respondent shall pay to Robert W. Heagney the amount of $50,941.92 as a reasonable fee, including litigation expenses, in representing Complainant in this matter between October 7, 1992 and June 21, 1994.

It is further **ORDERED** that Respondent shall pay to Complainant such additional damages as shall be awarded in a subsequent **ORDER** pending the receipt of additional data from the Complainant. Such **Motion For Reconsideration** shall be postmarked within twenty **(20)** days of receipt of this **Recommended Decision and Order.** Respondent shall have fourteen (14) days to file a response thereto.

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DAVID W. DI NARDI
ADMINISTRATIVE LAW JUDGE

DATED:
Boston, Massachusetts
DWD:gcb

[ENDNOTES]

[1] The following abbreviation shall be used herein: "ALJ"-Administrative Law Judge Exhibits; "CX"-Complainant Exhibits; "DX"-Administrator Exhibits "RX"-Respondent Exhibits; "TR"-Transcript.

[2] The time frame for filing a complaint under the Act has been amended recently and now provides that employees have one hundred and eighty days, rather than thirty days, after the occurrence of an alleged violation of the Act in order to file a complaint. **See** 42 U.S.C.S. § 5851 (Supp. May, 1993). The

amendments to Section 5851 which were enacted on October 24, 1992 are applicable to claims filed on or after October 24, 1992. **(Id.)**

[3] For several years, there was a dispute regarding whether or not purely internal complaints to management constitute protected activity; however, the Secretary of Labor has issued decisions which find that an employee is protected when engaging in this particular activity. **See** S. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK 37, 43 (1990); **compare Kansas Gas & Elec. Co. v. Brock**, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) (court upheld Secretary of Labor's position that employee protection provision of Energy Reorganization Act protects purely internal complaints) with **Brown & Root, Inc. v. Donovan**, 747 F.2d 1029 (5th Cir. 1984) (court held that quality control inspector's internal filing of intra-corporate complaint was not protected activity). As noted above, Congress has resolved this dispute with the passage of subsection (A) Quoted above. 42 U.S.C. § 5851 (a)(2).

[4] Creekmore claims entitlement to lost pension benefits. Yet as evidenced by his testimony and by the report of his actuarial expert, Creekmore is not just seeking lost pension benefits to the date of judgement, which would be an element of back pay. Rather, Creekmore is seeking lost pension benefits from the date of termination all the way to his retirement fifteen or so years into the future. As a matter of law, once he gets beyond the judgement date, lost pension benefits no longer constitute back pay. They are front pay. **Marcing v. Fluor Daniel, Inc.**, 826 F.Supp. 1128 (N.D. Ill. 1993)(**citing Graefenhain v. Pabst Brewing Co.**, 870 F.2d 1198, 1210 7th Cir. 1989). Front pay, however, is frequently not an appropriate remedy in employment termination cases.

The Act is silent on the issue of front pay. 42 U.S.C. § 5851(b)(2)(B). Front pay, however, is commonly viewed as prospective relief which may be awarded only in those cases where reinstatement, which is specifically provided for in the statute, is not an appropriate remedy. **See McCuiston v. Tennessee valley Authority**, 89-ERA-6 (1991). In the **McCuiston** case, the Secretary of Labor -- while declining to decide whether the ERA provided for front pay at all -- denied the complainant's prayer for front pay because he had not proven that "a productive and amicable working relationship would be impossible." **Id.** at 95. The only evidence in this record is that PSESI personnel tried, albeit unsuccessfully, to assist Complainant with reinstatement. Under the **McCuiston** rationale, therefore, front pay would be inappropriate in this case as well.

There is a second reason why Complainant is not entitled to front pay, including lost pension benefits, according to Respondent. Complainant rejected ABB's quite substantial overtures to place him in a position at the same job grade as his former position. Any entitlement period, therefore, would cut off at the point which Complainant rejected his potential

reemployment opportunities for reasons not attributable to his former employer. **Stanfield v. Answering Service,** 867 F.2d 1290 (11th Cir. 1989).

[5] Because the appraisal is presumably in writing, it is the best evidence of its contents, and oral testimony about the contents of a document are inadmissible, unless it is shown that this document is unavailable. 29 CFR § 18.1004. No such showing has been made in this case.

[6] The Final Order shall be issued by the Secretary of Labor.